Petition

81-2093

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

COUNTY OF IMPERIAL, JAMES HARMON, LOUIS LEGASPI, JOHN KENNERSON, JAMES BUCHER, TUNNEY WILLIAMS, HERMAN M. SPERBER and J. LEONARD SPEER,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN DE LEON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. In light of *Mitchum v. Foster*, 407 U.S. 225 (1972), and this Court's prior ruling in this action, *County of Imperial v. Munoz*, 449 U.S. 54 (1980), should *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939), be overruled? The Court of Appeals said no.

2. May a federal district court grant a preliminary injunction which in effect stays proceedings in a state court where the injunction is *not* authorized by Act of Congress, is *not* necessary in aid of the federal court's jurisdiction, and does *not* have the effect of protecting or effectuating the federal court's judgments (*see* 28 U.S.C. § 2283)? The Court of Appeals said yes.

3. When by a decision of the California Supreme Court, which this Court left undisturbed on appeal, a landowner was held estopped to challenge his conditional use permit's prohibition on sale of water for use outside the county, may third parties who wish to purchase the landowner's water for export to Mexico obtain a federal-court injunction against enforcement of the state-court injunction against the landowner? The Court of Appeals said yes.

4. Are the third parties described in Question 3 "strangers" to the prior state-court litigation within the meaning of *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939), and therefore not prohibited by 28 U.S.C. § 2283 from obtaining the federal-court injunction described in Question 3? The Court of Appeals said yes.

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vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, and LIC. JUAN DE LEON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Reported Decision Below.

The Ninth Circuit decision as to which petitioners seek certiorari was reported as *Munoz v. County of Imperial*, 667 F.2d 811 (9th Cir. 1982); a copy of the decision is attached hereto as Annex A. A copy of the decision of the District Court, 510 F. Supp. 879 (S.D. Cal. 1981) is attached as Annex B.

Copies also are attached, as Annexes C, D, and E, respectively, of the following prior decisions in this case: *County of Imperial v. Munoz*, 449 U.S. 54 (1980); *Munoz v. County of Imperial*, 604 F.2d 1174 (9th Cir. 1979); and the unreported Order Granting Motion for Preliminary In-

junction and Preliminary Injunction, No. 77-491-T (S.D. Cal. August 29, 1977).

Copies also are attached, as Annexes F, G, and H, respectively, of the following proceedings in the related California case *County of Imperial v. McDougal*: the unreported Order Clarifying Stay of Execution Provisions in Contempt Judgment, No. 43353 (Super. Ct. Imperial County March 22, 1979); the unreported Contempt Judgment, No. 43353 (Super. Ct. Imperial County March 6, 1979); and *County of Imperial v. McDougal*, 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472, *rehearing denied, id., appeal dismissed for lack of a substantial federal question*, 434 U.S. 899 (1977).

Statement of Jursidiction.

The judgment of the Court of Appeals was entered on February 8, 1982, and this petition was filed within 90 days thereafter. Jurisdiction exists under 28 U.S C. § 1254(1).

Statutory Provision Involved.

The statutory provision involved in this case is the "Anti-Injunction Act," 28 U.S.C. § 2283, which reads:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Statement of the Case.

In 1967, W. Erle Simpson was issued a use permit by the County of Imperial (the "County") authorizing the sale of water from a well on his premises, which was located in a residential subdivision. The permit contained a condition that water from the premises could not be sold for use outside the County.

In June, 1972, Donald C. McDougal ("McDougal") purchased the premises and, without obtaining a new permit, commenced selling water which was exported by tank truck to Mexico. The County sought injunctive relief in the Superior Court.

The Superior Court rejected McDougal's contention that the use permit export restriction violated the Commerce Clause of the United States Constitution. After trial, a permanent injunction was granted enjoining McDougal and all persons acting in concert with him from "conducting a trucking operation on the premises similar to that which occurred on or about June 30, 1972."

On Appeal, McDougal renewed his challenge to the use permit restriction on the ground that it violated the Commerce Clause. However, the state Court of Appeal affirmed the Superior Court judgment and the California Supreme Court granted hearing.

The California Supreme Court partially affirmed the judgment by holding McDougal bound by the export restriction and estopped from challenging its validity. *County of Imperial v McDougal*, 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472 (1977) (Annex H).

The estoppel against McDougal resulted from the facts that the out-of-county sale restriction was not challenged by Mr. Simpson and that his request to export water to Mexico was voluntarily withdrawn from the permit application. Due to the estoppel, the California Supreme Court concluded it was unnecessary to determine whether the export restriction was violative of the Commerce Clause, as urged by McDougal. Petition for rehearing, filed by McDougal, was denied.

McDougal's appeal to this Court was dismissed for lack of a substantial federal question. 434 U.S. 899 (1977).

Respondents Gallego Munoz, Martinez, and de Leon are residents of Mexico who had contracts for purchasing water from McDougal and were exporting water to Mexico. In July, 1977, they filed the instant action in the federal District Court seeking to enjoin the County, certain of its officers, and the Superior Court from enforcing the use permit export restriction. Respondents alleged the restriction violated the Commerce Clause of the United States Constitution and asserted the state courts erred in the *McDougal* decision.

Respondents alleged federal subject-matter jurisdiction under 28 U.S.C. § 1332(a)(2) (diversity between foreign and state citizens) and 28 U.S.C. § 1331(a) (arising under the Constitution); however, Respondents did not allege a violation of 42 U.S.C. § 1983.

In response to Respondents' motion for preliminary injunction, the County urged the District Court to deny relief and to dismiss, on the ground (*inter alia*) that the federal action was barred by 28 U.S.C. § 2283. The District Court, however, issued a preliminary injunction enjoining the County and its officers from enforcing the condition in the use permit held by McDougal.

McDougal thereafter resumed sales of water for export to Mexico. The County, unsuccessful in seeking a stay, appealed to the Court of Appeals for the Ninth Circuit solely on questions of bar. During the pendency of the federal appeal, the Superior Court found McDougal in contempt of its judgment, but stayed execution of the contempt order.

In affirming the District Court, the Court of Appeals rejected the County's argument that Respondents' action was barred by the Anti-Injunction Act. 604 F.2d 1174 (9th Cir. 1979) (Annex D).

On certiorari, the United States Supreme Court vacated and remanded. *County of Imperial v. Munoz*, 449 U.S. 54

(1980) (Annex C). The Supreme Court first held, contrary to the Ninth Circuit's position, that the federal preliminary injunction was "an injunction to stay proceedings in a State court" even though addressed only to a litigant and not to the state court itself; thus, the Anti-Injunction Act was potentially applicable. *Id.* at 58-59. The Supreme Court also was unconvinced by "[t]he Court of Appeals' final reason (and the District Court's only reason) for finding the Act inapplicable," *id.*: namely, *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939). The central question under *Hale* was whether plaintiffs here "were 'strangers to the state court proceeding' who were not bound 'as though [they were parties] to the litigation in the state court.' " 449 U.S. at 59-60. Because neither the District Court nor the Court of Appeals had addressed this question, the case was remanded to the Ninth Circuit with the admonition that "[u]nless respondents were such 'strangers,' the injunction they sought was barred by the Act." *Id.* at 60.

Justice Powell, concurring, indicated that he was ready to reconsider *Hale*.

Justice Blackmun concurred in the result. He appeared to agree that *Hale*, as interpreted today, was bad law.

Two Justices (Brennan, joined by Stevens) dissented on the grounds that the courts below had found plaintiffs to be "strangers," and that nothing in the record suggested they were not strangers. Justice Marshall also dissented, without opinion, although he noted that he would have dismissed the writ as improvidently granted.

On remand, the Ninth Circuit vacated the preliminary injunction and remanded the action to the District Court. 636 F.2d 1189 (9th Cir. 1981).

The District Court then re-entered its preliminary injunction. 510 F. Supp. 879 (S.D. Cal. 1981) (Annex B). The

District Court implied in open court that in effect it had previously defined the word "strangers" as "all persons who are not parties or privies" and had previously ruled that Respondents were not parties or privies.

The County appealed again to the Ninth Circuit on the Anti-Injunction Act issue (*inter alia*) and again was rebuffed. 667 F.2d 811 (9th Cir. 1982) (Annex A).

The Court of Appeals held that this case was not distinguishable from *Hale*, and that therefore the Anti-Injunction Act was inapplicable if Respondents were "strangers." Agreeing with the District Court, and holding that the definition of "strangers" in the Anti-Injunction Act context was "non-parties not bound by collateral estoppel," 667 F.2d at 815, the Court of Appeals rejected the County's proposed definition of "strangers."

The Court of Appeals further held that Respondents were not in privity with McDougal; although the subject of both the state and federal litigations was apparently McDougal's right to sell, and Respondents' corresponding right to buy, the same water for export, Respondents actually sought to vindicate in the federal action the right (independent of McDougal's similar right) to be free of state-imposed restrictions that unreasonably burdened their foreign commerce. *Id.* at 816.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE HOLDING OF THE CALIFORNIA SUPREME COURT IN THE *McDOUGAL* CASE.

As this Court recognized when it granted the County's earlier petition for a writ of certiorari and then vacated and remanded the Court of Appeals' judgment, the preliminary injunction in this case is squarely in conflict with the judgment of the California Supreme Court. Now the District Court and the Court of Appeals have simply reaffirmed the preliminary injunction, leaving the County no option but to again seek relief from this Court.

As before, the conflict between the state judgment and the federal injunction is dramatic. The California Superior Court, holding that the condition in McDougal's use permit was valid and enforceable, enjoined him from selling water for export; this judgment was affirmed by a unanimous California Supreme Court on the ground of estoppel, and McDougal's appeal to this Court was dismissed for lack of a substantial federal question. *County of Imperial v. McDougal,* 19 Cal. 3d 505, 564 P.2d 14, 138 Cal. Rptr. 472, *appeal dismissed,* 434 U.S. 899 (1977) (Annex H).

The federal preliminary injunction, on the other hand, expressly prohibits the County from enforcing that same condition in the use permit.

The severity of this conflict is underscored by the fact that the state court found McDougal in contempt for continuing to sell water in violation of the condition and of the state court's injunction, but stayed execution pending resolution of the federal appeal (which in effect would enjoin the state-court proceedings). *See* Annexes F, G. It is a matter of public importance that this Court grant this petition and resolve the jurisdictional conflict.

II.

THE COURT OF APPEALS ERRED IN NOT RECOGNIZING THE ANTI-INJUNCTION ACT, COUPLED WITH THE DECISION OF THE CALIFORNIA SUPREME COURT, AS A BAR TO RESPONDENTS' ACTION.

A. This Court's Recent Holdings in Anti-Injunction Act Cases Mandate That *Hale* Be Formally Overruled.

The Anti-Injunction Act, 28 U.S.C. § 2283, unequivocally provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

This statute and the policy it embodies have been pillars of federalism since Congress provided on March 2, 1793, that in federal courts "a writ of injunction [shall not] be granted to stay proceedings in any court of a state." 1 Stat. 335. It is essential to protect our dual system of state and federal courts from the evils caused by forum-shopping litigants; "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970) (Black, J.). The Anti-Injunction Act rests in part "on the fundamental constitutional independence of the States and their courts." *Id.* at 287.

In recent years the Supreme Court has read the Act strictly to remove this injunctive power from the federal courts in every case unless one of the three statutory exceptions in § 2283 applies. *Id.*; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). In *Vendo Co.*, the Supreme Court stated its position on the Anti-Injunction Act in no uncertain terms:

the Act is an "absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act." 433 U.S. at 630 (plurality opinion). Moreover, it is "clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Id.* at 631, *quoting Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 514 (1955). *See also Bread Political Action Committee v. Federal Election Commission*, No. 80-1481 (U.S. Supreme Ct. March 8, 1982) (three statutory categories under Federal Election Campaign Act held exclusive).

The overriding force of the Anti-Injunction Act is now clearly recognized by the Supreme Court. For example, in *Atlantic Coast Line R.R.*, the Supreme Court expressly held that

> a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings *merely because those proceedings interfere with a protected federal right* or invade an area preempted by federal law, *even when the interference is unmistakably clear*. . . . This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation.

398 U.S. at 294-95 (emphasis added). (And this even though the Court was assuming that the state court was substantively wrong and that it was defeating federally-guaranteed rights. *Id.* at 291 n. 5.)

It is in this light that this Court must decide whether or not a judicially-created exception to the Act — the "strangers" exception of *Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939) — permits Respondents to proceed with their action. In *Hale*, an in-state cement company obtained a peremptory

writ of mandamus from a state court compelling the state Road Department to enforce a state statute imposing a "tariff" on imported cement. A foreign cement company then obtained an injunction from a federal district court restraining the Road Department from enforcing the same statute (because of its violation of the Commerce Clause). On appeal of the federal injunction, the United States Supreme Court held that former 28 U.S.C. § 379, the predecessor of the Anti-Injunction Act, did not bar this "suit of strangers to the state court proceedings," *id.* at 377-78, and affirmed the injunction on the merits.

But, as more recent Courts (*Amalgamated Clothing Workers; Atlantic Coast Line R.R.; Vendo Co.*) have expressly held, *all judicially-created exceptions to the Anti-Injunction Act's bar are impermissible*: "Congress made it clear beyond cavil that the [Act's] prohibition is not to be whittled away by judicial improvisation," 348 U.S. at 514; "Congress itself set forth the only exceptions to the statute," 398 U.S. at 295; the Act is an "absolute prohibition against any injunction of the state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act," 433 U.S. at 630.

These Supreme Court holdings have sounded the death knell for *Hale* and its judicially-created, rarely-invoked "strangers" exception. Now is the time for this Court to follow its own line of precedent and formally overrule *Hale*.

B. There Is No Policy Reason Not to Overrule *Hale*.

In *Hale*, the decision of the state court was clearly wrong, yet the Florida Road Department (collusively, perhaps) declined to bring to the United States Supreme Court on certiorari or appeal the state-court judgment compelling it to enforce the statute. Therefore, the Court believed that if Bimco had been barred by the Anti-Injunction Act, no fed-

eral court (including the Supreme Court) would ever have been able to correct the state court's federal constitutional error, *see* 306 U.S. at 378; worse yet, an easy method would have been established for private parties and state agencies collusively to insulate unconstitutional state statutes from federal-court review. Accordingly, in 1939 *Hale* was an appropriate judicial response to a perceived structural problem.

In 1972, however, this Court wholly eliminated the policy justification for *Hale* by deciding *Mitchum v. Foster*, 407 U.S. 225 (1972). Its holding that 42 U.S.C. § 1983 was an Act of Congress expressly authorizing federal injunctions to stay proceedings in State courts (and therefore within one of the *Congressionally*-created exceptions to the Anti-Injunction Act) wiped out forever the perceived *Hale* problem that collusive state-court action could insulate unconstitutional state statutes or actions from federal-court review. Since *Mitchum v. Foster* now permits the type of action which *Hale* was concerned with to be heard in federal court in unquestionable compliance with the explicit terms of the Anti-Injunction Act, upon an allegation of a violation of 42 U.S.C. § 1983, there no longer is any reason whatever for this Court to allow the extrastatutory *Hale* exception to continue to exist.

Therefore, Respondents here have no policy argument to set up against the forceful policy arguments and recent Supreme Court holdings in favor of an explicit reading of the statute generally prohibiting federal courts from enjoining state-court proceedings — a statute which rests in part on no less a foundation than "the fundamental constitutional independence of the States and their courts." 398 U.S. at 287.

When the reason of a rule ceases, so should the rule itself. Here, the reason for the *Hale* rule has been nonexistent since *Mitchum v. Foster* was decided. *Hale* should be formally overruled.

C. If *Hale* Is Overruled, Respondents' Action Is Barred.

Without the judicially-created *Hale* exception, Respondents' action must be barred by the Anti-Injunction Act. None of the three Congressionally-created exceptions to the Act covers this action. *See County of Imperial v. Munoz*, 449 U.S. at 60 n.4.

No Act of Congress expressly authorizes a federal injunction to stay state-court proceedings in this action; Respondents have not (as this Court previously noted) alleged a violation of 42 U.S.C. § 1983. Moreover, an injunction is not necessary in aid of the federal court's jurisdiction here, nor is an injunction needed to protect or effectuate the federal court's judgments.

Therefore, if this Court wishes to overrule *Hale*, it should grant certiorari, vacate the Court of Appeals' judgment, and remand with instructions to direct the District Court to dismiss Respondents' action.

D. The Court of Appeals' Definition of "Strangers" Was Erroneous.

The Ninth Circuit's definition of "strangers" and consequent application of *Hale* carried the clear stamp of error. The Court of Appeals defined a "stranger" to a state-court judgment, who enjoyed the *Hale* exception to the Anti-Injunction Act, as one who was bound to that judgment as a party or privy under principles of *collateral estoppel*. 667 F.2d at 815. This definition does not merely create an exception to the Act; it actually *repeals* it as to third parties.

Consider that *any* third party who opposes a state-court judgment is either bound to it by collateral estoppel, or is not. If bound, his federal injunction action will be dismissed on the ground of collateral estoppel (with the Anti-Injunction Act a mere redundancy); if not bound, says the Court of Appeals, the Anti-Injunction Act again has no role to play, for the third party is within the *Hale* "strangers" exception! In short, the Ninth Circuit's interpretation of the Anti-Injunction Act is: "Any third party who is able to maintain a federal injunction action to stay proceedings in a state court (whether or not on a federal ground) has nothing to fear from the Anti-Injunction Act."

This is obvious error. No statute should be "interpreted" so as to rob it of all effect and meaning. Moreover, the weighty policies supporting the Anti-Injunction Act, and Congress' manifest intent to vindicate those policies, both demand that actions requesting federal injunctions against state-court proceedings be subject to stricter rules of bar than is the general gamut of actions (to which the rules of collateral estoppel and res judicata are, of course, applicable).

The Court of Appeals' untenable position is yet another indication that *Hale* should be formally overruled. If for some reason this Court should not choose to overrule *Hale*, however, certiorari nonetheless should be granted to allow this Court to declare a correct definition of "strangers."

In the District Court and the Court of Appeals, the County has argued that Respondents were McDougal's privies in that their suit and his both concerned his right to sell, and their corresponding right to buy, the same water for export. Alternatively, the County argued, Respondents fell within a small, new category of "non-strangers" (*i.e.*, privies for § 2283 purposes) fully subject to the prohibition of the Anti-Injunction Act.

The existence of this new category was indicated by the earlier refusal by the majority of this Court to vote with the dissenting Justice Brennan (joined by Justice Stevens), who argued that the District Court and Court of Appeals had implicitly found that Respondents were not parties or privies. Even more important, the majority used the following argument to refute Justice Brennan: since the Ninth Circuit "did not even decide" whether Respondents had been in privity with McDougal in the state-court litigation, the Ninth Circuit "most assuredly could not have decided and did not decide that the respondents were 'strangers to the state court proceeding.' " 449 U.S. at 60 n. 3. The plain implication of this sentence is that after a court has determined whether a person was a privy (and it is undisputed that the person was not a party), something more must be decided before the court can say whether or not that person was a "stranger"; that is, "*even*" if Respondents were found to be non-privies, it would still be an open question whether they were "strangers."

Therefore, since no findings have yet been made as to whether Respondents, even though not parties or privies, are "non-strangers" barred by the Act, certiorari should be granted to vacate and remand the Court of Appeals' judgment even if *Hale* is not overruled.

III.
CONCLUSION.

The Anti-Injunction Act was designed to prevent just such embarrassing and unfortunate situations as this case presents: a federal injunction against enforcement of a decision of the California Supreme Court (which this Court left undisturbed on appeal). Recent Supreme Court holdings have made it clear that the judicially-created exception to the Anti-Injunction Act on which the lower courts relied is

obsolete and should be formally overruled. *Amalgamated Clothing Workers, Atlantic Coast Line R.R.*, and *Vendo Co.* have disapproved all judicially-created exceptions to the Anti-Injunction Act; *Mitchum v. Foster*, by recognizing 42 U.S.C. § 1983 as a statutory exception to the Act, made the *Hale* extrastatutory exception unnecessary. Therefore, it is of great importance that this Court issue its writ of certiorari here both to resolve a specific direct conflict between the California and federal court systems and to restore good order to a fundamental area of jurisprudential federalism.

Respectfully submitted,

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Appendix

APPENDIX.

ANNEX A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Guillermo Gallego Munoz, *et al.*, Plaintiffs-Appellees, v. County of Imperial, *et al.*, Defendants-Appellants. No. 81-5332.

[February 8, 1982].

Appeal from the United States District Court for the Southern District of California.

Before FERGUSON, NELSON and REINHARDT, Circuit Judges.

FERGUSON, Circuit Judge:

I. BACKGROUND

Defendant McDougal owns land in the County of Imperial ("County"). With the land, McDougal acquired a conditional use permit which allowed him to sell water on condition that it be sold only for the use within the county.[1] McDougal's neighbors complained to the county about water trucks leaving his property, and the county sued in superior court to enforce the prohibition in the conditional use permit against selling water outside the county.[2]

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[1]It emerged in oral argument that McDougal's use permit is the only one of its kind in the County. A parcel with a well some eight miles from McDougal's parcel, and also within the County, has no export ban on water attached to the use of the property.

[2]The county's original suit had three causes of action: one for violating the zoning law by violating the conditional use permit, a second for public nuisance, and a third for violation of the county's Groundwater Appropriations Ordinance. The third cause was separated from the first two for trial by stipulation, but never tried. The trial court made no findings on the second cause, having determined that that was unnecessary because McDougal had violated the zoning law. 19 Cal.3d at 508 n.1, 138 Cal.Rptr. 472, 564 P.2d 14.

The superior court enjoined McDougal from conducting his trucking operation. The California Court of Appeal held that the condition barring export of water in McDougal's use permit violated the Commerce Clause and that the use permit that allowed McDougal to remove water was void. McDougal appealed to the California Supreme Court, which held that McDougal was subject to the conditions in the permit, and that McDougal, by accepting the benefits of the permit, was estopped from challenging its constitutionality. *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14, 18 (1977). An appeal to the Supreme Court was dismissed for want of a substantial federal question. *McDougal v. County of Imperial*, 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 306 (1977).

Plaintiffs Munoz, Martinez and De Leon then brought an action in United States District Court, seeking declaratory and injunctive relief to prevent the County from enforcing the conditional permit (the defendants are the County, the Sheriff, the County Counsel, members of the County Board of Supervisors, and McDougal). Munoz is a Mexican merchant who has a contract to act as McDougal's water broker. Munoz signed an affidavit on McDougal's behalf in the state trial court proceedings, and also filed as *amicus curiae* before the California Supreme Court. Martinez and De Leon are Mexican merchants who have not been permitted to purchase McDougal's water for export. Plaintiffs argued in district court that the conditional use permit violated the Commerce Clause. The district court, which concluded that plaintiffs would probably succeed on the merits and that they would suffer irreparable harm without an injunction, issued a preliminary injunction restraining the County from enforcing the restriction in the use permit. Some months later, the California Supreme Court held McDougal in con-

tempt for selling water outside the County, but stayed an order pending the County's appeal in the federal courts.

On appeal to this court, the County claimed that the Anti-Injunction Act, 28 U.S.C. § 2283,[3] removed the district court's power to issue the preliminary injunction. In holding that the Anti-Injunction Act did not bar the federal injunction, this court held that there were no pending state court proceedings left to be enjoined, only the enforcement of the California Supreme Court judgment. *Munoz v. County of Imperial*, 604 F.2d 1172, 1176 (9th Cir. 1979). Like the district court, this court also relied on *Hale v. Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939) (Frankfurter, J.), which held that strangers to a state court proceeding are not barred by the Anti-Injunction Statute, which was a precursor of the Anti-Injunction Act, from challenging the constitutionality of a statute in federal court when the statute is also under litigation in the state courts.

A majority of the Supreme Court held that the state court action against McDougal was a pending state court proceeding. *County of Imperial v. Munoz*, 449 U.S. 54, 59, 101 S.Ct. 289, 292, 66 L.Ed.2d 258 (1980). However, the majority opinion also remanded the case to determine whether plaintiffs were " 'strangers to the state court proceedings' who were not bound 'as though [they were parties] to the litigation in the state court.' " *Id.* at 59-60, 101 S.Ct. at 292-293. On remand, the district court found that plaintiffs were strangers to the state court proceedings and granted the preliminary injunction, 510 F.Supp. 879.

On appeal from the district court, there are two issues:

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[3]The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

1. Did the district court err in finding that the Anti-Injunction Act does not bar plaintiffs' proceedings in federal court because plaintiffs are "strangers" to the state court proceedings?
2. Did the district court commit reversible error in granting the preliminary injunction?

II. THE ANTI-INJUNCTION ACT DOES NOT BAR PLAINTIFFS' PROCEEDING IN FEDERAL COURT BECAUSE PLAINTIFFS ARE "STRANGERS" TO THE STATE COURT PROCEEDINGS.

Defendants argue that the "stranger exception" to the Anti-Injunction Act does not apply in the instant case because this case is factually distinguishable from *Hale v. Bimco,* the case that sets forth the exception. Furthermore, defendants argue that even if *Hale* applies, plaintiffs are not strangers to the state proceeding.

A. The *Hale* Exception Governs This Case.

In *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939) (Frankfurter, J.), the State of Florida sought a writ of mandamus ordering the state road department to enforce a statute requiring the inspection of cement imported into the state. The road department's demurrer, raising the unconstitutionality of the statute under the commerce clause as a defense, was overruled. Bimco, an out-of-state company, subsequently attacked the constitutionality of the statute in federal court and obtained a federal injunction restraining the road department from enforcing the statute. The state court then stayed mandamus proceedings until the United States Supreme Court ruled. The Supreme Court held that 28 U.S.C. § 379, the predecessor of the current Anti-Injunction Act, did not bar the federal injunction since to hold otherwise was to

> assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings. This assumes that the mandamus proceeding *bound the independent suitor in the federal court as though he were a party to the litigation in the state court*. This, of course, is not so. *Chase National Bank v. Norwalk*, 291 U.S. 431, 441, 54 S.Ct. 475, 479, 78 L.Ed. 894.

306 U.S. at 377-78, 59 S.Ct. at 526-27 (emphasis added).

The *Hale* case is factually similar to the instant case. In *Hale*, the state sought a writ of mandamus to enforce a state statute; in the instant case, the county sought an injunction to enforce its use permit. Like the statute in *Hale*, the use permit in this case is of doubtful validity under the Commerce Clause. In *Hale*, as in the instant case, out-of-state parties sought a federal injunction to prevent enforcement of state court judgments. Instead of distinguishing *Hale* from the instant case, the Supreme Court in *County of Imperial v. Munoz*, 449 U.S. 54, 60, 101 S.Ct. at 289, 293, 66 L.Ed.2d 258 (1980), merely remanded to determine whether plaintiffs were strangers: "unless respondents were such 'strangers,' the injunction they sought was barred by the Act." *Id.* at 60, 101 S.Ct. at 293. Because *Hale* does not appear to be distinguishable in any significant respect from the instant case, it should govern. Therefore, this court must decide whether plaintiffs are "strangers" to the state court proceedings.

B. The Meaning of "Strangers."

1. Strangers to a proceeding are persons who are not bound as though they were parties to the litigation.

In referring to "strangers to the state court proceedings," and a party not bound as though he were a party to litigation, *Hale, supra*, at 378, 59 S.Ct. at 527, relied on *Chase Na-*

tional Bank v. Norwalk, 291 U.S. 431, 441, 54 S.Ct. 475, 479, 78 L.Ed. 894 (1934) (Brandeis, J.). *Chase* stands for the proposition that a person neither party nor privy to litigation in state courts is not bound by litigation in the state court and may seek an injunction in federal court to stay the state court proceedings. It is clear that in *Chase* "stranger" meant a person who was not bound as a party or privy to litigation. *See id.* at 441, 54 S.Ct. at 479.

Defendants reject *Chase* as "one of the now-discredited cases 'prior to the enactment of Title 28 of the United States Code in 1948 . . .' " However, they cite no authority that the *Chase* understanding of "stranger," later adopted by *Hole*, has been discredited. Moreover, it is far from clear that *Chase* is a discredited case. Rather, it appears to be part of the basic law regarding the anti-injunction statute which Congress meant to restore in 1948 with the enactment of the Anti-Injunction Act.[4]

2. Non-parties that do not control litigation are strangers.

The Supreme Court has observed that non-parties who assume control over litigation in which they have a direct financial or proprietary interest and who then seek to re-

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[4]*Mitchum v. Foster*, 407 U.S. 225, 237, 92 S.Ct. 2151, 2159, 32 L.Ed.2d 705 (1972), comments:

> In *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, [62 S.Ct. 139, 86 L.Ed. 100] the Court in 1941 issued an opinion casting considerable doubt upon the approach to the anti-injunction statute reflected in its previous decisions. The Court's opinion expressly disavowed the "relitigation" exception to the statute, and emphasized generally the importance of recognizing the statute's basic directive "of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." 314 U.S. at 132 [62 S.Ct. at 143]. The congressional response to *Toucey* was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which, as the Reviser's Note makes evident, *served not only to overrule the specific holding of Toucey, but to restore "the basic law as generally understood and interpreted prior to Toucey decision."*

(Footnotes omitted and emphasis added).

determine issues previously resolved are bound by collateral estoppel. *Montana v. United States*, 440 U.S. 147, 154, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979). Such parties are not "strangers to the cause." *Id.*

In *Montana, supra*, the Court considered the following factors in determining that the United States had "exercised control" over previous litigation:

(1) The Government required the previous lawsuit to be filed;

(2) it reviewed and approved the complaint;

(3) it paid attorneys' fees and costs;

(4) it directed the appeal;

(5) it appeared and submitted a brief as *amicus* in the State Supreme Court;

(6) it directed the filing of a notice of appeal;

(7) it effectuated the abandonment of that appeal by a party in the state court proceeding.

The Court concluded, "Thus, although not a party, the United States plainly had a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." *Id.* at 155, 99 S.Ct. at 974 (citations omitted). Thus, a non-party that is sufficiently involved in litigation to "actuate principles of estoppel" is not a stranger to that proceeding.

Hale, Chase, and *Montana* all show that "strangers" are non-parties who are not bound to previous litigation by collateral estoppel. Defendants cite no cases to support their proposition that non-strangers fill a larger class than that of parties and privies bound by previous litigation. Indeed, the Supreme Court's most recent pronouncements on the meaning of strangers reiterate the traditional understanding that they are non-parties not bound by collateral estoppel. *Montana v. United States, supra*, 440 U.S. at 154, 99 S.Ct. at

974; *County of Imperial v. Munoz, supra*, 449 U.S. at 59, 101 S.Ct. at 292.

Collateral estoppel principles have been developed over the years by courts, and present a useful guide for the definition of "strangers" or "non-strangers." In contrast, defendants' definition of "non-strangers" is hopelessly vague: "those persons who, although not closely enough related to a litigating party to be a privy for res judicata purposes, are nonetheless closely enough related to the litigating party to be barred from certain kinds of relitigation by the Anti-Injunction Act." We shall follow established principles for defining "strangers to the cause," rather than embark on a new and nebulous path.

C. Plaintiffs are Strangers to the State Court Proceedings.

Unless plaintiffs are parties or privies as if bound by the state proceedings, they are strangers to those proceedings.

First, plaintiffs were not parties to the state court proceedings, nor do defendants claim otherwise.

Second, the trial judge ruled that plaintiffs and McDougal had no common interest in property and that privity between plaintiffs and McDougal was therefore lacking. Nevertheless, defendants argue that plaintiffs and McDougal are in privity because they have a common interest in water that is the subject matter of litigation. The point of this argument by the defendants is that, by their lights, the right the plaintiffs seek to litigate now is the very same right that McDougal litigated in the state court — his right to sell, and their right to purchase, his water. It is of course hornbook law that in sales transactions the buyer only gets whatever the seller has. If it can be made to appear that the right at issue here is a right which the plaintiffs only obtained through contractual relations with McDougal, then it does

indeed follow that they are in privity with him, and that they are not strangers to the state proceedings.

This argument fails, however. The right which the plaintiffs seek to litigate is *not* one which they obtained through contractual relations with McDougal. It is a completely independent right deriving directly from the Commerce Clause—the right to be free of state-imposed restrictions that unreasonably burden their efforts to engage in interstate and foreign commerce. McDougal, to be sure, has a similar right, which the California Supreme Court held he was equitably estopped from asserting because he accepted the benefits of the conditional use permit. To hold that the plaintiffs' Commerce Clause right is similarly extinguished by McDougal's acceptance of those benefits would be a serious error.

The point is most easily made by means of an example. Suppose the conditional use permit prohibited McDougal from selling water to Mormons. A Mormon plaintiff in privity of contract with McDougal could not be equitably estopped from challenging the constitutional validity of the use permit. Such a plaintiff would have a personal right arising directly from the Fourteenth Amendment—a right that he or she could not have surrendered merely by entering into a contract with McDougal. Such a plaintiff would not simply "stand in the seller's shoes" with respect to that right. In such a case, the seller, equitably estopped from asserting the buyer's constitutional right because he had accepted the benefits of the use permit, could not adequately represent the buyer's right. The principle relied on by the derfendants here—"federal courts will bind a non-party whose interests were represented adequately by a party in the original suit," *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977),

would not apply. The same reasoning should be applied where the right at issue is a Commerce Clause right.

Third, plaintiffs are not privies as if bound by the state proceeding, because they did not control the state court proceeding. De Leon and Martinez had no relation to the state proceedings. Munoz entered as *amicus curiae* before the California Supreme Court, but the filing of an amicus brief has never been enough to bind a non-party to the result of a proceeding. *Stryker v. Crane*, 123 U.S. 527, 540, 8 S.Ct. 203, 209, 31 L.Ed. 194 (1887); *Boeing Airplane Co. v. Aeronautical Industrial Dist.*, 91 F.Supp. 596, 602 (W.D.Wash.1950), *aff'd*, 188 F.2d 359 (9th Cir. 1951). Munoz also signed a declaration on McDougal's behalf in the state court proceedings. However, the amicus brief and the declaration fall far short of the control exerted in *Montana v. United States, supra*, where the court concluded that a party had a sufficient "laboring oar" in the conduct of state-court litigation to actuate principles of estoppel. Finally, defendants point to the naming of McDougal as a defendant in the federal complaint as proof that plaintiffs and McDougal acted in concert. There is, however, no direct evidence for this, and there are other explanations for plaintiffs' naming McDougal as a defendant.[5]

Because plaintiffs are not parties or privies as if bound by the state proceedings and because they did not control a party to the state proceedings, they are strangers to those proceedings.

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[5]Plaintiffs claim that they had legitimate motives for naming McDougal as defendant:

> This would seem reasonable in light of the third cause of action seeking specific performance and McDougals [sic] alleged conduct in demanding affidavits under penalty of perjury (see declaration of Juan De Leon in support of preliminary injunction).

Appellees' Brief at 30 n.4.

III. THE PRELIMINARY INJUNCTION WILL NOT BE OVERTURNED

The panel that heard the County's first appeal from the district court expressly noted that the County did not challenge the district court's findings that the elements necessary for the granting of preliminary injunctive relief were present. *Munoz v. County of Imperial*, 604 F.2d 1174, 1175-76 (9th Cir. 1979). In that appeal, the only issue was whether the Anti-Injunction Act precluded the district court from issuing the preliminary injunction. The same issue was the only one considered by the Supreme Court on certiorari. The highest court vacated the judgment below and remanded to the court of appeals, which remanded to the district court, solely to determine whether plaintiffs were " 'strangers to the state court proceedings' who were not bound as though [they were parties] to the litigation in the state court." *County of Imperial v. Munoz*, 449 U.S. 54, 59-60, 101 S.Ct. 289, 292-293, 66 L.Ed.2d 258 (1980).

From the above recital of previous proceedings, it is apparent that defendants, by challenging the findings of the district court regarding preliminary injunctive relief, are now raising a new issue that they did not raise in their last appeal to this court. We need not and do not consider a new contention that could have been but was not raised on the prior appeal.[6] *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 618 (9th Cir. 1980); *Penn Int'l Industries v.*

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[6]The terms of the new injunction do not differ in any material respect from those of the original injunction that this court affirmed and that the Supreme Court vacated, nor do the evidence and arguments used to support or oppose the new injunction differ in any material respect from the original evidence and arguments.

Pennington Corp., 583 F.2d 1078, 1082 (9th Cir. 1978); *Calhoun v. Bernard*, 359 F.2d 400, 401 (9th Cir. 1966). It is already the law of the case that the injunction was issued properly.

AFFIRMED.

ANNEX B.

Memorandum Opinion and Order.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, Humberto Martinez, Lic. Juan de Leon, Plaintiffs, v. County of Imperial, Superior Court of the State of California, in and for the County of Imperial, James Harmon, Luis Legaspi, John Kennerson, James Bucher, Tunney Williams, Herman M. Sperber, J. Leonard Speer, Donald Courtney McDougal, Defendants. Civil No. 77-491-T.

[March 26, 1981].

TURRENTINE, District Judge.

This case has wound its way up to the Supreme Court and back down again. *County of Imperial v. Munoz*, — U.S. —, 101 S.Ct. 289, 66 L.Ed.2d 258 (1980), *vacating* 604 F.2d 1174 (9th Cir. 1979). The Ninth Circuit has remanded the case to this court for proceedings in accordance with the Supreme Court's decision. *Munoz v. County of Imperial*, 636 F.2d 1189 (9th Cir. 1981).

Briefly by way of background,[1] in a separate state court action the County of Imperial successfully enjoined Donald C. McDougal from selling well water for use outside the County, as dictated by his conditional use permit. *County of Imperial v. McDougal*, 19 Cal.3d 505, 564 P.2d 14, 138 Cal.Rptr. 472, *appeal dismissed* (for want of substantial federal question), 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 306 (1977). Present plaintiff Munoz participated as an *amicus curiae* before the California Supreme Court. Munoz

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[1]The facts are more completely outlined in the Supreme Court's opinion, — U.S. at —, 101 S.Ct. at 291-92, and in this court's prior order (see Appendix).

has a contract with McDougal to act as his broker in arranging sales of water to Mexico, and plaintiffs Martinez and de Leon had also purchased water for use in Mexico. The state injunction forced McDougal to halt sales to plaintiffs. The instant federal action was then brought by plaintiffs, seeking to enjoin the County from enforcing the use permit restriction, and arguing the permit terms violated the Commerce Clause, Art. I, § 8, cl. 3. By order dated August 29, 1977, (attached as Appendix) this court granted plaintiffs a preliminary injunction, which was affirmed by the Ninth Circuit[2] and vacated by the Supreme Court.[3]

The fundamental issue on appeal was whether the Anti-Injunction Act, 28 U.S.C. § 2283, barred this court from issuing the preliminary injunction. Under *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939), this court has jurisdiction to issue an injunction in this situation only if plaintiffs were "strangers to the state court proceeding." *See County of Imperial*, — U.S. at —, 101 S.Ct. at 293. The Supreme Court remanded the case because it felt that neither this court nor the court of appeals had addressed the question whether plaintiffs were "strangers" to the state action.[4] *Id.*[5]

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[2]604 F.2d 1174 (9th Cir. 1979).

[3]— U.S. —, 101 S.Ct. 289, 66 L.Ed.2d 258 (1980).

[4]The County has presented elaborate arguments attempting to show that the Anti-Injunction Act bars an injunction, and that even if the court does have jurisdiction the equities weigh against issuing an injunction. The court addressed virtually all of these arguments in its prior order (see Appendix), and the County has presented no new facts which might alter the court's conclusions. Neither the Supreme Court nor the court of appeals cast doubt upon any aspect of this case other than the "strangers" issue, and it was for the limited purpose of addressing this issue that the case was remanded.

[5]Three members of the Court felt that plaintiffs had already been determined to be "strangers" by the lower courts. — U.S. at —, 101 S.Ct. at 293-94 (Blackmun, J., concurring. Brennan and Stevens, JJ., dissenting).

Both this court and the court of appeals have referred to *Hale* as a case which exempts "third parties" from coverage by the Anti-Injunction Act in a federal lawsuit subsequent to a state suit. *See* 604 F.2d at 1176; Appendix. Apparently the purpose of remand is to determine whether our characterization of plaintiffs as "third parties" is equivalent to the term "strangers" as used in *Hale*.[6]

The dictionary defines "strangers" as, "all other persons in the world, except only the parties and privies. In its general legal signification the term is opposed to the word 'privy.' " Black's Law Dictionary 1590 (4th Ed. 1951). There is general agreement that the only persons bound by a judgment are those who were parties or privies to the prior action. *See* 1B Moore's Federal Practice ¶ 0.411[1], at 1251 (2d ed. 1980). The *Hale* Court in essence described a "stranger" as an independent suitor in federal court who would not be bound as though he were a party to the state litigation. *See Hale*, 306 U.S. at 377-78, 59 S.Ct. at 527. Thus, the definitions indicate that "strangers" (i.e., those not bound) are persons who are not parties or privies. Confirmation that this is the meaning intended by the *Hale* Court is found in *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S.Ct. 475, 78 L.Ed. 894 (1934), which the *Hale* Court cited in its discussion of "strangers." *Chase* interchangeably uses the term "stranger" with "a person not a privy." *Id.* at 441, 54 S.Ct. at 479. This court concludes that a

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[6]In answer to the dissent's argument that the lower courts had already found plaintiffs to be "strangers," the Supreme Court majority stated that since the *court of appeals* had refrained from explicitly deciding whether there was privity, it followed that the *court of appeals* had not decided the "stranger" issue. — U.S. at —, 101 S.Ct. at 293 n.3. The majority did not explain why it felt that this court, which did find a lack of privity (see Appendix), had not reached the "stranger" question. *Cf.* — U.S. at —, 101 S.Ct. at 294 n.3 (Brennan, J., dissenting).

"stranger," within the meaning of *Hale*, is one who was not a party or privy to the state court action.

It is undisputed that plaintiffs were not named parties to the state litigation. Munoz did file an *amicus* brief with the California Supreme Court,[7] but an *amicus curiae* does not have the status of a party, and is not bound in any way by the judgment. 1B Moore's Federal Practice ¶ 0.411[6], at 1551 (2d ed. 1980); *Brown-Crummer Investment Co. v. Paulter*, 70 F.2d 184, 186 (10th Cir. 1934). This court thoroughly examined the privity question in its August 29, 1977, preliminary injunction order, in connection with a discussion of res judicata. The court ruled that plaintiffs were not in privity with McDougal because they had no property interest in McDougal's land or use permit (see Appendix). No reason has been shown to disturb this finding. The conclusion reached in that plaintiffs were not parties or privies.

The County argues that even if plaintiffs were not parties or privies, they should be classified "non-strangers." Apparently the County asserts that plaintiffs are "almost" in privity with McDougal, and that persons almost in privity should not be considered "strangers." The County cites no authority for their vaguely defined "non-stranger" category, but it seems akin to what Professor Moore terms "participating non-parties." *See* 1B Moore's Federal Practice ¶ 0.411[6] (2d ed. 1980). These are persons whose extensive involvement behind the scenes of a case, generally controlling the course of litigation, causes them to be bound by the judgment. *Id. See also Simon v. Maryland Casualty Co.*, 353 F.2d 608, 612 (5th Cir. 1965). Nothing in the

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[7]Plaintiffs Martinez and de Leon were not *amicus curiae*, and nothing in the record suggests that they participated in any manner in the state proceedings.

record supports a conclusion that plaintiffs were "participating non-parties" controlling McDougal's actions in the state case. McDougal was not merely a nominal defendant in the state action, rather he had substantial and distinct[8] personal rights at stake and cannot be characterized as having defended "in the name of" the present plaintiffs. *See Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910); 1B Moore's Federal Practice ¶ 0.411[6] (2d ed. 1980). Therefore, assuming that "participating non-parties" are not considered to be privies,[9] the plaintiffs here have not been shown to have participated in the state case to a degree requiring that they be bound by the judgment.

In summary, since plaintiffs were not parties or privies to the state court action, they are "strangers" within the meaning of *Hale*. Therefore, the Anti-Injunction Act is inapplicable and this court has the power and authority to issue an injunction. For the reasons stated and upon the terms described in the court's order dated August 29, 1977, (see Appendix), a preliminary injunction shall again issue restraining the County supervisors and their agents from

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[8]In the state case, the court held that McDougal was deemed to have waived any objection to the constitutional validity of the conditional use permit. *County of Imperial v. McDougal*, 19 Cal.3d at 510-11, 564 P.2d 14, 138 Cal.Rptr. 472, *appeal dismissed* (for want of substantial federal question), 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 306 (1977). His standing to object to the permit constraint was based upon, and limited by, his ownership of the land with which the permit ran. *Id.* The instant plaintiffs, in contrast, are asserting Commerce Clause rights not dependent on land or permit ownership. McDougal's legal rights differed sharply from those of the present plaintiffs.

[9]The extensive ties and involvement between parties and "participating non-parties" suggests their relationship may be akin to privity. *See* 1B Moore's Federal Practice ¶ 0.411[6], at 1553 (2d ed. 1980).

enforcing the restriction in the use permit that prohibits sale of water for use outside Imperial County.

SO ORDERED.

APPENDIX

[The contents of the District Court's Appendix are identical to Annex E to this petition, and thus are omitted.]

ANNEX C.

Opinion.

Supreme Court of the United States.

County of Imperial, et al., Petitioners, v. Guillermo Gallego Munoz, et al., Respondents. No. 79-1003.

[December 2, 1980].

Certiorari to the United States Court of Appeals for the Ninth Circuit.

Justice STEWART delivered the opinion of the Court.

The Anti-Injunction Act, 28 U.S.C. § 2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This case presents issues respecting the scope of that Act.

I

In 1972, Donald C. McDougal bought from W. Erle Simpson a tract of land in Imperial County, Cal. Although the tract was in a residential subdivision, the county's zoning ordinance allowed the tract's owner to develop its natural resources if he could obtain a conditional use permit. With the land, McDougal acquired such a permit, which allowed him to sell well water on the condition that it be sold only for use within the county. Simpson had never challenged that condition, nor had he ever sold much water from his well. Like Simpson, McDougal did not challenge the condition, but he did sell a good deal of water, and he sold some of it for use outside the county. McDougal's neighbors grew irritated by the many trucks carrying water from McDougal's premises, and they complained to the county. The county sought to vindicate its zoning ordinance and

permit by asking a California Superior Court for injunctive and declaratory relief that would prohibit McDougal from selling water for consumption outside the county.

The state trial court enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972."[1] On appeal to the California Supreme Court, McDougal argued that the permit's geographic restriction was invalid. The state appellate court declined to reach that argument, since "a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit." 19 Cal.3d 505, 138 Cal.Rptr. 472, 476, 564 P.2d 14, 18. The California Supreme Court thus affirmed the Superior Court's decision that the sale of water outside the county violated the ordinance, although it reversed the Superior Court's finding that the frequent truck traffic at McDougal's premises violated the zoning ordinance. McDougal appealed that judgment to this Court, which dismissed his appeal for want of a substantial federal question. 434 U.S. 944, 98 S.Ct. 469, 54 L.Ed.2d 306.

The respondents in this case are Mexican merchants: Respondent Munoz has a contract with McDougal to be his broker in arranging sales of water to Mexico; Respondents Martinez and de Leon have agreed to purchase McDougal's water for consumption in Mexico. Although none of the respondents was a named party to McDougal's suit in the state courts, all of them were interested and—to an undetermined degree—involved in it, and Munoz participated

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[1]The state trial court opinion is unreported.

as *amicus curiae* before the California Supreme Court. Twelve days after that court had denied McDougal's petition for rehearing, and even before this Court had dismissed his appeal the respondents initiated the present litigation by filing in the United States District Court for the Southern District of California a complaint seeking declaratory and injunctive relief to prevent the County of Imperial from enforcing the terms of McDougal's conditional permit. They argued in the District Court that those terms violated the Commerce Clause of the Constitution. Art. I, § 8, cl. 3. The District Court concluded that respondents would suffer irreparable harm were there no injunction, and that they would probably succeed on the merits. Accordingly, the court issued a preliminary injunction restraining the county "from enforcing the restriction in the use permit which prohibits sales of water for use outside Imperial County."[2]

Some months later, the California Superior Court ordered McDougal to show cause why he should not be held guilty of contempt for violating the court's injunction by selling water for use outside the county. After proceedings in which the county participated, he was found guilty of contempt and again ordered to cease selling water for use outside of Imperial County. That order was stayed, however, pending the outcome of the county's appeal of the federal trial court's order to the United States Court of Appeals for the Ninth Circuit. Subsequently, the Court of Appeals affirmed the District Court's order of preliminary injunction, 604 F.2d 1174, and this Court granted the county's petition for a writ of certiorari. 445 U.S. 903, 100 S.Ct. 1077, 63 L.Ed.2d 318.

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[2]The District Court opinion is unreported.

II.

The county has maintained throughout the present litigation that the Anti-Injunction Act operates to prohibit the District Court from enjoining it from enforcing the terms of McDougal's permit. In rejecting that argument, the District Court cited *Hale v. Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771, and said that "this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely it does not lose the right to do so merely because the statute has been tested in state courts." In reaching the same conclusion, the Court of Appeals reasoned that the state trial court proceedings had terminated, and that the injunction, therefore, did not violate the rule that the Act cannot be evaded by addressing a federal injunction to the parties rather than to the state court. It also agreed with the District Court that, under the *Hale* case, "third parties are not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the courts." 604 F.2d, at 1176.

In our view the threshold reasoning of the Court of Appeals disregarded the teaching of this Court's opinion in *Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234. In that case, the railroad had secured a state-court injunction prohibiting the union from picketing a railroad facility. Two years later, the union tried but failed to convince the state court to dissolve the injunction in light of an intervening decision of this Court. The union did not appeal that decision, but instead persuaded a federal court to enjoin the railroad "from giving effect to or availing [itself] of the benefits of" the state court injunction. 398 U.S., at 286, 90 S.Ct., at 1742. This Court held that "although this federal injunction is in terms directed only at the railroad it is

an injunction 'to stay proceedings in a State court.' " *Ibid.* The view of the Court of Appeals in the present case that after a state court has entered an injunction, its proceedings are concluded for the purpose of the Anti-Injunction Act was thus contrary to the square holding of the *Atlantic Coast Line* case.

The Court of Appeals' final reason (and the District Court's only reason) for finding the Act inapplicable was this Court's decision in *Hale v. Bimco Trading Co., supra.* There, a cement company had secured from a state court a writ of mandamus ordering the state road department to enforce a statute requiring the inspection of cement imported into the State. Bimco Trading Co. subsequently obtained a federal court injunction restraining the road department from enforcing the statute. This Court held that 28 U.S.C. § 379—the predecessor of the current Anti-Injunction Act—did not bar the federal injunction, since to hold otherwise would have been to

> "assert that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute, bars injunctive relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceeding. This assumes that the mandamus proceeding bound the independent suitor in the federal court as though he were a party to the litigation in the state court. This, of course, is not so." 306 U.S., at 377-378, 59 S.Ct., at 526-527.

Neither the District Court nor the Court of Appeals addressed the question whether respondents in this case were "strangers to the state court proceeding" who were not bound "as though [they were parties] to the litigation in the

state court."[3] Unless respondents were such "strangers," the injunction they sought was barred by the Act.[4]

Accordingly, the judgment is vacated and the case is remanded to the Court of Appeals.

Justice POWELL, concurring.

Although I join the opinion of the Court on the basis of its reading of *Hale v. Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771, I record my willingness to reconsider *Hale*. It has rarely been cited and—as the Court reads it today—it creates an exception to the coverage of the Anti-Injunction Act that I think is contrary to the policy of that Act.

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[3]The dissenting opinion today rests entirely on the supposition that the Court of Appeals has already decided this question. That supposition is demonstrably untenable:

The Court of Appeals found that the Anti-Injunction Act was inapplicable, and proceeded to consider the merits of the petitioners' res judicata defense, a defense based upon the judgment in the state litigation. The court held that the doctrine of res judicata did not in any event apply in the circumstances here presented, and accordingly explicitly declined to consider whether the respondents had been "in privity" with McDougal in the state litigation. Since the court did not even decide that the respondents had not been in privity with McDougal in the state litigation, it most assuredly could not have decided and did not decide that the respondents were "strangers to the state court proceeding."

[4]The respondents contend that their suit comes within one of the statutory exceptions to the Act. First, they urge that the "in aid of jurisdiction" exception applies. They apparently reason that the District Court was not barred from entering a declaratory judgment, that a declaratory judgment unsupported by an injunction would be a nullity, and that therefore an injunction was necessary "in aid of" the District Court's subject matter jurisdiction over Commerce Clause questions. This argument proves too much, since by its reasoning the exception, and not the rule, would always apply. Second, respondents assert that this case falls within the exception to the Act for injunctions "expressly authorized by Act of Congress." They cite *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), for the undoubted proposition that suits under 42 U.S.C. § 1983 are within that exception. This argument cannot prevail, however, for the simple reason that the respondents' complaint did not rely on or even so much as mention § 1983.

Justice BLACKMUN, concurring in the result.

For me, the Court's opinion is somewhat opaque. Perhaps it is intentionally so.

I agree with Justice BRENNAN that respondents were—and were necessarily determined by the Court of Appeals to be—"strangers to the state court proceeding," *post*, at 294, who were not bound by the state court litigation. No principle of res judicata evoked by the California litigation applies to them.

I join the Court in vacating the Court of Appeals' judgment and remanding the case, however, for I am troubled by that court's apparent misreading of *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), and by its analysis of the effect of the Anti-Injunction Act, 28 U.S.C. § 2283, upon the particular facts of this case.

At the same time, I am disturbed by what seems to me to be the implication of this Court's opinion, namely, that the Anti-Injunction Act does not apply when the state litigation involves different parties. If I am correct that this is the premise, I believe that the Court is indulging in a new exposition of the meaning of *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939). The Anti-Injunction Act imposes a flat and positive prohibition. It then allows three exceptions. None of those exceptions is applicable to the situation before us, which involves a single use restriction on a single parcel of land. The precedent of *Hill v. Martin*, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293 (1935), *Atlantic Coast Line R. Co.*, *supra*, and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 2887, 53 L.Ed.2d 1009 (1977), supports a conclusion that the Anti-Injunction Act bars the federal court from issuing an injunction against enforcement

of this use restriction. Yet, a holding to that effect would not oust the federal court of jurisdiction to order other forms of relief, such as a declaratory judgment. It is worth noting, or so it appears to me, that the state court has made clear, by its stay of the contempt order, that it will abide by the federal resolution of the constitutional issue.*

The situation presented by this case is an inevitable result of our having two independent judicial systems. The Anti-Injunction Act cannot eliminate all conflicts, and was not so intended. It precludes federal injunctions that interfere with state proceedings. Heretofore, this Court has applied the Act's restrictions strictly. I would expect that approach to be continued.

Justice BRENNAN, with whom Justice STEVENS joins, dissenting.

To vacate and remand to the Court of Appeals to determine whether respondents were "strangers to the state court proceeding" within the meaning of *Hale v. Bimco Trading Co.*, 306 US. 375, 377-378, 59 S.Ct. 526, 526-527, 83 L.Ed. 771 (1939), is to require the Court of Appeals to perform a task it undoubtedly has already performed. The Court of Appeals concluded that respondent's lawsuit did not contravene the Anti-Injunction Act, 28 U.S.C. § 2283, and relied on *Hale* as a basis for its conclusion. Necessarily implicit in that conclusion was the court's judgment that the *Hale* test had in all pertinent respects been satisifed and

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**Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939), is distinguishable, for that case involved an attack on a state statute and a complete legislative scheme that was being applied to many parties in many different circumstances. That situation differs significantly from the particularized use restriction with which the present litigation is concerned.

that, accordingly, respondents were "strangers to the state court proceeding."[1]

The Court identifies nothing in the record to support a conclusion that respondents were not "strangers to the state court proceeding," apart, perhaps, from respondent Munoz's participation as *amicus curiae* before the California Supreme Court. Even if *amicus* status were sufficient to require Munoz's withdrawal as a party,[2] it is undisputed that neither respondent Martinez nor respondent de Leon played any role in the state court litigation. The Court's statement that "all of [the respondents] were interested and—to an undetermined degree—involved in it," *ante*, at 291, is, therefore, unfounded.[3]

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[1]The District Court similarly concluded that *Hale v. Bimco Trading Co.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939), did not bar the instant lawsuit and thus necessarily also found that respondents were "strangers to the state court proceeding."

[2]The language of *Hale* quoted by the Court, *ante*, at 292, suggests that *amicus* status does not impair one's standing as a "stranger," since the Court contrasted an "independent suitor in the federal court" with "a party to the litigation in the state court." 306 U.S., at 378, 59 S.Ct., at 527. Munoz clearly was not such a party.

[3]The District Court stated:

> "But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs', it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit." Pet. for Cert., at B-5.

While it is true, as the Court notes, *ante*, at 293, n.3, that the Court of Appeals, unlike the District Court, "declined to consider whether respondents had been 'in privity' with McDougal in the state litigation," that refusal has no bearing on the disposition of petitioners' Anti-Injunction Act claim. With respect to that claim, the court necessarily found that respondents were "strangers to the state court proceeding," and its disposition of the res judicata claim on a ground other than privity is irrelevant.

Under these circumstances, to require the Court of Appeals to find—yet again—that respondents were "strangers to the state court proceeding" is an unneccessary waste of judicial resources. Accordingly, I dissent from the remand and would affirm.

Justice MARSHALL also dissents but would dismiss the writ as improvidently granted.

ANNEX D.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Guillermo Gallego Munoz; Humberto Martinez, Lic. Juan de Leon, Plaintiffs-Appellees, vs. County of Imperial; Superior Court of the State of California, in and for the County of Imperial; James Harmon; Luis Legaspi; John Kennerson; James Bucher; Tunney Williams; Herman M. Sperber; J. Leonard Speer; Donald Courtney McDougal, Defendants-Appellants. No. 77-3293.

[July 26, 1979].

Appeal from the United States District Court for the Southern District of California.

Before: TRASK and WALLACE, Circuit Judges, and HOFFMAN,* District Judge.

PER CURIAM:

Appellants County of Imperial (County) and its officials challenge in this appeal a preliminary injunction entered by the district court enjoining the County from enforcing a condition in a use permit held by one Donald C. McDougal. The condition prohibits the sale of water from McDougal's land for use outside the County of Imperial. We affirm the preliminary injunction. To explain our holding, we include the pertinent historical facts leading up to the instant litigation.

McDougal, who is not a party in this appeal, owns certain real property in the County of Imperial in southern California. When he purchased the property, he also received a conditional use permit that allowed the commercial sale of water under the County's zoning law. As a condition to

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*Honorable Walter E. Hoffman, Senior United States District Judge, for the District of Virginia, sitting by designation.

this sale, the permit required that the water be sold only for use in Imperial County.

The previous owner made little use of the water sale rights, but McDougal increased the operation substantially. When the neighbors complained about the increased business activity, the County brought suit in the California Superior Court to enjoin McDougal's water sales. The County alleged that McDougal was violating the conditional use permit by selling water for export outside the county and by employing large tank trucks which made noise and created fumes and dust.

The county was successful in its action and McDougal was enjoined from conducting a trucking operation of the type he started after purchase of the property. On appeal, the California Supreme Court partially affirmed the lower court's holding. *County of Imperial v. McDougal*, 19 Cal.3d 505, 138 Cal.Rptr. 472, 564 P.2d 14 (1977). The court upheld the export restriction in the conditional use permit by finding that it could not be challenged by McDougal. According to the court:

> "[A] landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit (citations omitted). Thus, McDougal is estopped to assert that the prohibition . . . against the sale of water is invalid, and he is bound by the limitation." 564 P.2d at 18.

The court specifically added, in a footnote to this quote, that in view of this holding it did not need to reach the constitutional question as to whether the permit's prohibition on the export of water was valid. 564 P.2d at 18, n.3. Finally, the court reversed the trial court's determination

that the export limitation also prohibited McDougal from conducting a large-scale water sale operation. The court found the limitation not to be a regulation of land use but rather a condition upon the sale of a commodity, specifically a prohibition against the sale of water outside the County. 564 P.2d at 19.

Following this ruling, McDougal reopened the well. Pursuant to the California Supreme Court ruling upholding the export restriction. McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

Appellees Munoz, Martinez and deLeon are Mexican merchants who had contracts for purchasing water from McDougal and were exporting the water to Mexico. When they returned to purchase water after the reopening of the well, McDougal refused to sell it to them because of the terms of his conditional use permit. Appellees then filed the instant action in federal district court and applied for a preliminary injunction. The injunction sought to keep the County from enforcing the out-of-county sale restriction on the ground that it violated the Commerce Clause, Article I, § 8, cl. 3, of the United States Constitution. The court ruled in appellees' favor and enjoined the County from enforcing the no export term of the conditional use permit. The County appeals from this order.

The district court found the elements necessary for the granting of preliminary injunctive relief—irreparable injury,

probable success on the merits,[1] balance of equities in plaintiff's favor, and presence of a public interest, *see Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9th Cir. 1978); *Sierra Club v. Hathaway*, 579 F.2d 1162, 1167 (9th Cir. 1978)—to be present in this case. The County does not challenge these findings, but argues instead that the California state court proceedings preclude the district court from issuing an injunction.

The County claims that under the Anti-Injunction Act, 28 U.S.C. § 2283, the existence of the state proceedings removes the district court's power to issue the preliminary injunction. The Anti-Injunction Act provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The district court found the Anti-Injunction Act not to be a bar because there was no pending state court proceeding

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[1]The district court found the restriction on the sale of water outside Imperial County to be on its face a direct prohibition against interstate commerce in the water. Consequently, the court found it likely that appellees would succeed on the merits of their contention that the restriction in the use permit violates the Commerce Clause.

While we do not reach the merits of the Commerce Clause question, we note that subsequent to the issuance of the district court injunction, the United States Supreme Court decided *Hughes v. Oklahoma*, 99 S.Ct. 1727 (1979). In *Hughes v. Oklahoma*, the Court struck down an Oklahoma statute which prohibited the export outside of the State of minnows procured from state waters. The Court found that the statute "on its face discriminates against interstate commerce" and that "[s]uch facial discrimination by itself may be a fatal defect, regardless of the State's purpose . . . . At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." 99 S.Ct. at 1737.

The district court's decision regarding the merits of the Commerce Clause question should be made in light of *Hughes v. Oklahoma*.

which would be enjoined by the federal injunction. The County argues that there was still a pending proceeding in the enforcement of the California Supreme Court judgment. In *Hill v. Martin*, 296 U.S. 393 (1935), the United States Supreme Court stated:

> "The prohibition of § 265 [the predecessor to the present 28 U.S.C. § 2283] is against a stay of 'proceedings in any court of a State.' That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . . It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective." 296 U.S. at 403. (footnotes omitted).

Recently, in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), the Supreme Court applied this rule and overturned a lower federal court order which enjoined the collection of a state court money judgment.

In the instant case, however, there does not remain a last act necessary to effectuate the California Supreme Court judgment in *County of Imperial v. McDougal*. McDougal has complied with the California Supreme Court ruling that he cannot challenge the no export prohibition and refuses to sell water to those who would export it out of the County. No further proceedings or enforcement provisions of the California Supreme Court decision remain which may be affected by the district court injunction. Moreover, even if ongoing state proceedings remain, appellees here, not being parties in the state suit, may mount a constitutional challenge in federal court against the law which is the subject of these state proceedings. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that third parties are

not barred under the Anti-Injunction Act from challenging a statute on federal constitutional grounds when the statute is also under litigation in the state courts. Finally, the district court's injunction did not violate the rule that "the prohibition of § 2283 cannot be evaded by addressing the order to the parties" rather than to the state court. *Atlantic Coast Line R.R. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 287 (1970). Appellees in their complaint sought to enjoin, in addition to the County and its officers, the California Superior Court from interfering with their right to purchase water from McDougal. The district court enjoined only the County and its officers and specifically added in its order that it "wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate commerce in the water." (emphasis in original). The purpose of excluding the California Superior Court from the injunction, however, is not to avoid impermissibly the effects of the Anti-Injunction Act. Instead the injunction excludes the California courts because those courts are not now faced with the issue of the constitutionality of the zoning ordinance. The injunction is directed against the County, the only body claiming that the zoning ordinance and its conditional use permit are constitutional. In such circumstances, the district court's issuance of the injunction against the County is not an attempt to circumvent the effect of the Anti-Injunction Act. We find that the Anti-Injunction Act does not bar the instant federal injunction.

The County's additional argument, that the instant action is precluded by the *res judicata* effect of the state court proceedings, must also be rejected. Under the doctrine of *res judicata*, a final valid judgment rendered on the merits is binding on the parties or their privies so as to prevent them from relitigating the same case in either the same or a different forum. *See Lawlor v. National Screen Service*

Corp., 349 U.S. 322, 326 (1955); *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978). "Before the doctrine may apply, there must be (1) a valid, final judgment, (2) rendered on the merits, (3) a subsequent action involving the same parties or those in privity with them, (4) that is based on the same cause of action or claim." *Hooker v. Klein*, 573 F.2d at 1367. The parties, focusing on the third element of this formula, have argued the question of whether appellees are in privity with McDougal so as to be bound by the California Supreme Court judgment against him. We need not reach this question, however, for we find that the other necessary elements of *res judicata* are missing here. A review of the California Supreme Court decision reveals that the issue of whether the County can constitutionally restrict the export of water was not reached by that court. *See County of Imperial v. McDougal*, 564 P.2d at 18, n.3. There is thus no valid final judgment on the merits existing as to the cause of action in the instant case. As a result, the California Supreme Court decision would not have a *res judicata* effect in a case where proper parties, including even those in privity with McDougal, are directly challenging the permit's validity on constitutional grounds. Since the doctrine of *res judicata* extends only to issues that have been litigated on their merits, *see Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Hooker v. Klein*, 573 F.2d at 1367, it is not applicable in this case.

The judgment of the district court is AFFIRMED.

ANNEX E.

Order Granting Motion for Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial, et al., Defendants. Civil No. 77-491-T.

The plaintiffs' motion for a preliminary injunction was heard on August 8, 1977. The plaintiffs appeared by Murry Luftig, Esq., and William Kronberger, Esq., Donald McDougal, Jr., Esq., appeared for defendant McDougal and James Harmon, Esq., appeared for the County of Imperial and for the other defendants. For the reasons and upon the conditions set forth below, the court grants the motion.

Facts

In 1967, one Simpson purchased a certain tract of land located in Imperial County and erected thereon a well. He applied for a use permit which would authorize the commercial sale of water from the well and the permit was granted with this condition: "[t]he water will be sold only for use within the Imperial County." Following the grant of the permit, Simpson sold water on a very small scale. Then in 1970 the land was zoned Open Space (S), requiring a conditional use permit for development of natural resources for commercial purposes.

In June, 1972, defendant McDougal bought the land from Simpson and soon the neighbors began to complain about increased operation of the well. In time the County filed suit against McDougal, seeking injunctive relief. Evidence was offered to the effect that McDougal had greatly expanded the scale of operation of the well by selling water for use in Mexico; there was evidence of heavy traffic in

large tank trucks at all hours of the day and night, and these trucks were accused of generating noise, fumes, dust and other unpleasantness.

The Superior Court of Imperial County enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972," based on its conclusion that McDougal's activities violated the 1970 zoning law.

The case was appealed and the California Supreme Court held that the restriction in the use permit prohibiting sale of water for use outside Imperial County could not be challenged by McDougal. *County of Imperial v. McDougal*, 19 Cal.3d 505 (1977), *reh. denied*, 19 Cal.3d 619b (1977). Following this ruling, McDougal reopened the well. In obedience to the injunction entered by the Superior Court, McDougal has, since the reopening, required each purchaser of water to sign an affidavit that the water being bought will be used only in Imperial County.

The plaintiffs, who had bought water from McDougal for transportation to Mexico during 1972, appeared at the well and offered to buy water. They refused to sign the affidavit and McDougal refused to sell them water. They now seek injunctive relief restraining the County and the Superior Court from interfering with their right to purchase water and requiring McDougal to sell water to them.

Jurisdiction

The defendants raise 28 U.S.C. §2283 (the "Anti-Injunction Act") as a bar to this proceeding. However, what is really being sought in this lawsuit is not to enjoin a pending state court proceeding but rather to restrain the enforcement of an allegedly unconstitutional ordinance. It seems obvious that this court may, if otherwise appropriate, restrain the operation of an unconstitutional statute; surely

it does not lose the right to do so merely because the statute has been tested in the state courts. In *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939), the Supreme Court held that a third party was not barred from challenging a statute merely because the same statute was also under litigation in the Florida courts. *Hale* is controlling here and this court concludes that section 2283 does not bar this lawsuit.

The defendants also argue that the proper method of attacking the California Supreme Court decision is by writ of certiorari to the United States Supreme Court, rather than by this lawsuit. However, the plaintiffs herein do not have the option of requesting such a writ. They are not parties to the state court action and can do nothing to appeal or otherwise influence the result. Hence the plaintiffs may proceed with the case in this court.

Res Judicata

The defendants vigorously argue that the state court proceedings in this case are *res judicata*. Under the doctrine of *res judicata*, a final valid judgment is binding on the parties so as to prevent them from re-litigating the same case in either the same or a different forum. The one issue presented by the doctrine of *res judicata* as applied in this case is identity of the parties; if the parties are identical to those involved in the state litigation, then *res judicata* will bar this lawsuit.

For purposes of the doctrine of *res judicata*, "identity of parties" actually means either the identical parties to the first lawsuit, or those in "privy" with them. The plaintiffs herein were not parties to the California lawsuit, but the defendants contend that these plaintiffs are in privy with McDougal and hence are bound by the decision of the California courts.

First, the defendants point out that the plaintiffs filed an *amicus* brief with the California Supreme Court favoring McDougal's presentation there. However, an appearance as *amicus* is insufficient to bind the one so appearing to the result of the case. 1B Moore's Federal Practice 2d ¶0.411[1], page 1253; *Brown-Crummer Investment Co. v. Paulter*, 70 F.2d 184 (10th Cir. 1934).

Second, the defendants urge that the extent of involvement between the plaintiffs and McDougal is sufficient to place them in privy with one another. The resolution of this contention requires a careful definition of what is at issue in this lawsuit.

Initially, we note "There is no generally prevailing definition of privity that can be automatically applied to all cases involving the doctrine of res judicata," 29 Cal.Jur.2d, Judgments §269, and "the determination of who are privies requires careful examination into the circumstances of each case as it arises," 50 C.J.S. Judgments §788. Neither party has cited, and the court has failed to find, any cases sufficiently close to the facts of this case as to constitute controlling precedent. Accordingly, some general principles of privity and *res judicata* will now be examined.

An adjudication of property rights binds the parties to the judgment and their successors in interest. Accordingly, it is said that those successors are privies to the judgment. 50 C.J.S. Judgments §788. Privity sometimes means "a mutual or successive relationship to the same rights of property, such an identification in interest of one person with another as to represent the same legal rights," 29 Cal.Jur.2d Judgments §269. "It has been declared that privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title," 46 Am.Jur.2d Judgments §532, and

"privity relates to persons in their relation to property and not to any question independent of property, and to make one a privy to an action, so as to bar him by the adjudication, he must have acquired an interest in the subject matter of the action," 50 C.J.S. Judgments §788.

The common theme running through all of the above citations, as well as through the various court decisions dealing with the problem of privity, is a common interest in property, which property is the subject matter of litigation. But the plaintiffs herein have no common property interest with McDougal. At issue in the state proceeding was McDougal's use permit; the use permit is a part of the land and runs with the land, as the California Supreme Court expressly held. The plaintiffs have no property interest in McDougal's land or in his use permit. Their interest is in the steps taken by the County to enforce what they perceive as an unconstitutional ordinance. Therefore, since the property interest which was litigated in the state courts was exclusively McDougal's and not the plaintiffs', it must follow that the plaintiffs were not in privity with McDougal and his state court judgment does not bar them from proceeding with this lawsuit.

The Elements of Injunctive Relief

The traditional elements of injunctive relief include the following, all of which a plaintiff must satisfy if he is to have the relief he seeks:

(a) Irreparable injury,

(b) Probable success on the merits,

(c) Balance of equities in the plaintiff's favor, and

(d) Granting the injunction is in the public interest.

William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86 (9th Cir. 1975).

In cases challenging the constitutionality of statutes or other legislative enactments, the first two elements predominate, *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98 (1948), although the court may not disregard the public interest, *Yakus v. United States*, 321 U.S. 414, 440 (1944). Accordingly, the elements of relief will each be examined in the context of the present controversy.

Irreparable Harm

A plaintiff who would be granted an injunction must first satisfy the court that without one he will suffer irreparable harm or, in other words, that his legal remedies are inadequate. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

In this case, the parties are in agreement that the harm the plaintiffs will suffer (if they do not get an injunction) is economic harm. Further, their damages are capable of reasonably precise calculation: to be specific, those damages would be the extra costs involved in driving to a more distant well to obtain water. Normally, the fact that mere economic injury is threatened is, of itself, sufficient grounds to deny equitable relief. However, in this case the court is presented with the extraordinary situation in which the plaintiffs have no adequate remedy at law for their damages because, although the plaintiffs can calculate their damages, there is no one from whom to collect those damages after they have been calculated.

Clearly, judicial immunity would shield the California courts at all levels from any liability. For his part, McDougal did no more than to obey an order of those courts on pain of going to jail, and it would be grossly unfair to hold him responsible in damages for obeying that order. The County of Imperial and its supervisors are the only defendants left, and they are protected from liability by California Govern-

ment Code §818.4, as interpreted by such cases as *O'Hagan v. Board of Zoning Adjustment*, 38 Cal.App.3d 722 (1974). Thus, there is no one to compensate the plaintiffs, and it must follow that they have no remedy at law. Accordingly, the injury they would suffer in the absence of an injunction is irreparable.

Success on the Merits

The power to regulate interstate and foreign commerce is granted exclusively to Congress by the Constitution (Art. I, §8, clause 3). State or local laws that directly interfere with interstate commerce are void, but the state may exercise its police powers in ways that do not "unduly" burden interstate commerce. *Southern Pacific Co. v. State of Arizona*, 325 U.S. 761 (1945).

In *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553 (1923), the Court held that a natural gas-producing state could not, by statute, give gas customers within the state a preferred status over out-of-state customers. And in *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 262 (1910), the Court invalidated a state law which had the "character and purpose" of denying the owners of natural gas the right to take it out of the state. The Court said: "no state can by action or inaction *prevent*, unreasonably burden, discriminate against, *or directly regulate*, interstate commerce or the right to carry it on." (221 U.S. at 272; emphasis added)

These two cases controlled the result in *City of Altus, Oklahoma v. Carr*, 255 F.Supp. 828 (W.D. Tex. 1966), *aff'd*, 385 U.S. 35 (1966). The City of Altus was challenging a Texas statute which forbade "drilling a well in Texas and transporting the water outside the State," 255 F.Supp. at 830. The court, relying on the natural gas cases,

supra, found that the prohibition of the interstate shipment of water was unconstitutional.

In this case, the restriction in McDougal's use permit does not seek to regulate *land* use. It seeks solely to regulate *commodity* use—specifically, the transportation of water outside of the county. The California Supreme Court expressly found that "the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county." *County of Imperial, supra*, at page 512. The restriction did not attempt to regulate land use, the conduct of a business, traffic in a residential area, or any other such activity. Instead, the restriction is on its face a direct prohibition against interstate commerce in the water. The Commerce Clause will not permit such a direct prohibition any more than it would permit the interference with commerce attempted by the States of West Virginia, Oklahoma, or Texas in the cases cited above.

The cases cited by the defendants do not deal with the same sort of direct prohibition of commerce. One case, however, deserves further comment. In *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), the Court upheld a New Jersey statute which prohibited the transportation of certain water outside the state. River water was involved, and the critical factor there was the limited property right in that water possessed by the party desiring to export it. The record does not show any such limit on McDougal's property interest in the water from his well.

Accordingly, there is a probability that the plaintiffs will succeed on the merits of their contention that the restriction in the use permit is unconstitutional.

The Equities and the Public Interest

In *Yakus, supra*, certain wartime price regulations were under attack. Those regulations and the statute which authorized them provided a means of review, but the plaintiff

there chose not to use the means provided. The Court found a compelling public interest in the subject matter of the statute as a whole and in preserving the scheme established for review of the regulations. Such factors are not present in this case, however.

There are no means by which these plaintiffs, in contrast to the plaintiff in *Yakus*, can challenge the restriction in the use permit other than the instant proceeding. The only other possible method of attack would be a political proceeding before the appropriate lawmaking entities of Imperial County, a method which the court in the *Altus* case found to be inadequate. Further, there is no compelling public interest which will be frustrated if the plaintiffs are granted their injunction. There is no comprehensive use plan or water conservation plan the implementation of which will be blocked by an injunction here. All that is involved is one specific piece of real estate and one specific phrase in one specific use permit. Thus, the compelling public interest which existed in *Yakus* is entirely absent here, and the public impact of an injunction will be minimal.

The court recognizes that commercial use of McDougal's well may be an irritant to others in the neighborhood. However, assessing the nature and intensity of such irritation and balancing it against the injury the plaintiffs are suffering, the court finds that the balance tips towards the plaintiffs.

Conclusion

For the reasons discussed above, the court concludes that the plaintiffs are entitled to a preliminary injunction restraining the supervisors and their agents from enforcing the restriction in the use permit which prohibits sale of water for use outside Imperial County.

The court wishes to emphasize that this injunction pertains *only* to efforts by the County of Imperial to prohibit interstate

commerce in the water. As the California Supreme Court noted, there is no reason why the county cannot, if it so desires, employ suitable means of land use control so as to prevent a public nuisance. There are many legitimate regulations which the police power would permit the county to impose; examples include limitations on operating hours of the well, limitations on noise in residential areas, restriction of trucks to designated truck routes, etc. The California Supreme Court noted that on remand the Superior Court could reach just such issues (19 Cal. 3d at page 513), and nothing in the instant opinion is to be construed to the contrary.

DATED: August 29, 1977.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

Preliminary Injunction.

United States District Court, Southern District of California.

Guillermo Gallego Munoz, et al., Plaintiffs, v. County of Imperial, et al., Defendants. Civil No. 77-491-T.

This matter was heard on August 8, 1977. For the reasons and upon the conditions set forth in the order granting the plaintiffs' motion for a preliminary injunction entered this date,

IT IS ORDERED that the County of Imperial and its supervisors, and their agents and employees, are enjoined from enforcing that condition in defendant McDougal's use permit which prohibits the sale of water for use outside the County of Imperial.

IT IS FURTHER ORDERED that this preliminary injunction is granted on condition that an undertaking in the sum of $1000.00 be filed to make good such damages, not to exceed said sum, as may be suffered or sustained by any party who is found to be wrongfully enjoined.

IT IS FURTHER ORDERED that this preliminary injunction may be served by any person over the age of eighteen years selected for that purpose by the plaintiff.

DATED: August 29, 1977.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

ANNEX F.

Order Clarifying Stay of Execution Provisions in Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed: March 22, 1979.

GOOD CAUSE APPEARING THEREFOR, the Court hereby modifies and clarifies the stay provisions of its Contempt Judgment, entered in the above captioned case on March 6, 1979, Book 140, page 375, as follows:

Paragraph 2 of page 2, lines 21 through 28, is hereby amended to read:

"2. Defendant McDougal shall cease the selling of water as above described. (Repeated from the aforesaid judgment, page 2.) This order is stayed pending a decision by the United States Court of Appeals for the Ninth Circuit in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293), as hereinafter provided. Should the County prevail in said appeal, the effective date of the above referenced cessation order shall be thirty (30) days from the entry of the decision by the Court of Appeals. Should the said Court of Appeals rule adversely to the County's position, and should the County appeal, the stay will continue until final determination of said appeal.

The Court reserves jurisdiction to otherwise modify the stay provisions herein, and/or to impose sanctions, on motion of either party.

The date of entry of the above referenced Contempt Judgment shall be deemed the date of entry of this order clarifying the stay of execution provisions thereof."

IT IS SO ORDERED.

DATED this 21st day of March, 1979.

/s/ Andrew J. Eyman

Andrew J. Eyman

Judge of the Superior Court

ANNEX G.

Contempt Judgment.

In the Superior Court of the State of California, in and for the County of Imperial.

County of Imperial, Plaintiff, vs. Donald C. McDougal, Defendant. No. 43353.

Filed, March 6, 1979.

Defendant Donald C. McDougal was, on May 1, 1978, ordered to show cause why he should not be adjudged guilty of contempt for disobeying the Judgment of this Court, entered on July 11, 1973, at Book 127, Page 936 of the Records of the Court, insofar as said judgment prohibits McDougal from selling water from the well on his premises at the Yuha Estates for use outside the County. Hearings on said matter were continued from time to time and concluded on February 28, 1979 at the Courthouse in El Centro, on which date the Defendant was present and represented by Donald C. McDougal, Jr., and David Kay, and, the County was represented by James H. Harmon, County Counsel.

Based on stipulations of Defendant McDougal's Counsel, and on written and oral evidence duly admitted at various hearings, the Court has determined that Defendant McDougal has continued, since September, 1977, to knowingly sell water from the aforesaid premises to persons and/or businesses, who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. The Court having, on the 28th of February, 1979, announced its intended decision to adjudge McDougal in contempt and, further findings having been waived, and the stay of execution provided for herein having been agreed to by the parties,

IT IS ORDERED, DECLARED AND DECREED as follows:

1. McDougal is knowingly selling water from the well on the above premises to persons and/or businesses who cause or allow the water to be transported for distribution and use outside the County of Imperial, particularly in Mexico. Such sale by McDougal constitutes willful disobedience of the Judgment of this Court, as affirmed by the California Supreme Court at 19 C 3d 505 (1977). Defendant McDougal is therefore adjudged guilty of contempt of Court, under Section 1209(5) of the Code of Civil Procedure.

2. McDougal shall cease the selling of water as above described. Execution of this order is, however, stayed until the United States Court of Appeal for the Ninth Circuit renders a decision in the case of *Guillermo Gallego Munoz, et al. v. County of Imperial, et al.* (Appeal No. 77-3293) or until such other time as ordered by this Court, whichever date is sooner.

Dated: March 5, 1979.

/s/ Andrew J. Eyman
Andrew J. Eyman
Judge of the Superior Court

ANNEX H.

Opinion.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Superior Ct. No. 43353).

[May 25, 1977].

In 1967, Imperial County (county) issued to W. Erle Simpson a use permit to allow commercial sales of water from a well on Simpson's property, which was located in a residential subdivision. The permit contained a limitation that water could be sold for use only within the county. Simpson did not challenge the condition, and he sold only small quantities of water from the well for local use. In 1970, the tract in which Simpson's property was located was zoned for low intensity use, but the zoning allowed the development of natural resources for commercial purposes upon the issuance of a conditional use permit.

Simpson sold the property to defendant Donald C. McDougal in 1972. McDougal, without obtaining a new permit pursuant to the 1970 enactment, proceeded to substantially increase the volume of sales of water from the well, and numerous trucks entered the property for the purpose of transporting the water. He failed to comply with the limitation in the Simpson permit against the sale of water for use outside the county, and much of the water from the well was sold for distribution in Mexico.

The county sought injunctive and declaratory relief, alleging that McDougal was violating the 1970 zoning law by selling water for export and by employing tank trucks to carry large amounts of water from the well, without a conditional use permit. The trial court found in the county's favor and enjoined McDougal from "conducting a trucking

operation on the premises similar to that which occurred commencing on or about June 30, 1972.'"[1]

On this appeal from the ensuing judgment, McDougal claims that he is not required to secure a permit pursuant to the 1970 zoning ordinance because under the permit issued to Simpson he has a vested right to increase the volume of sales from the well and to employ tank trucks for hauling the water away, and that the limitation in the permit against sales of water for use outside the county is invalid.

The subdivision in which Simpson's land was located consisted of 16 10-acre parcels which were governed by deed restrictions providing that the lots were to be used for residential purposes. Although the tract had not been comprehensively zoned in 1967 when Simpson applied for his permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted therein, and county officials notified Simpson that he was required to obtain a permit in order to conduct a commercial water sale business.

Public hearings were held on Simpson's application, initially before the planning commission, and subsequently before a joint meeting of the commission and the board of supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground that it would interfere with the quiet enjoy-

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[1]A second cause of action alleged that the manner in which McDougal operated his business constituted a public nuisance, and a third asserted that McDougal was violating the county's Groundwater Appropriations Ordinance. The third cause of action was by stipulation of the parties ordered to be separated from the first and second, and to be tried only upon good cause being shown on motion of either party. No trial of this count was held. The trial court made no findings on the second cause of action alleging a nuisance, determining that such findings were unnecessary because of its conclusion that McDougal was violating the county's zoning laws.

ment of their property, and the county's chief planning officer recommended against granting the permit for the same reason.

Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July 1972 as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well day and night.

The neighboring landowners protested the noise and fumes generated by the traffic, and county officials, contending that McDougal was required to secure a conditional use permit under the 1970 ordinance, demanded that he discontinue his operation. Thereafter, McDougal applied for a permit, but with insistence that his application was without prejudice to any subsequent claim that no permit was required. The permit was denied, and he unsuccessfully appealed the denial to the board of supervisors.

In October 1972, the county brought this action to restrain McDougal from selling water from the well or from allowing tank trucks to enter his property for the purpose of carrying water away, and it also sought a declaration that McDougal was violating the 1970 zoning ordinance.

The trial court found that McDougal's business "as conducted on the premises commencing on or about June 30,

1972" was in violation of the zoning ordinance because he had failed to secure a conditional use permit. It found further that the Simpson permit did not entitle McDougal "to conduct his type of operation" and that the restriction contained in that permit was designed to prevent the intensive commercial operation undertaken by McDougal because it would be incompatible with the surrounding residential land uses. Finally, the court determined that McDougal's business constituted an illegal "formidable expansion" of the usage contemplated under the Simpson permit, and that any effect on international commerce due to the restriction was merely incidental to a valid exercise of the police power designed to regulate local land use.

The court's judgment declaring that McDougal was in violation of the 1970 ordinance and enjoining him from "conducting a trucking operation on the premises similar to that which occurred commencing on June 30, 1972" appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. We conclude that the judgment must be upheld in its first aspect but that there was insufficient evidence to justify the prohibition against the manner in which the business was operated.

McDougal's fundamental assertion is that he was not required to obtain the conditional use permit required by the 1970 zoning ordinance, because he had a vested right, pursuant to the Simpson permit, to sell water from the well, and that he was not compelled to comply with the geographic restriction in the permit because it is invalid.

Initially, we observe that a conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit

is required.[2] (3 Anderson, American Law of Zoning (2d ed. 1977) p. 359.) Such permits run with the land (Cohn v. County Board of Supervisors (1955) 135 Cal.App.2d 180, 184), and McDougal succeeded to any benefits which Simpson enjoyed under the permit issued to him. Thus, if Simpson would have been allowed to carry on his business in the manner McDougal employed after June 1972, then McDougal was operating within the permit and was not required to secure a permit under the 1970 ordinance.

It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, by failing to challenge the limitations imposed upon him by the permit, waived his right to object to the condition prohibiting the sale of water for use outside the county. At the joint meeting between the planning commission and the board of supervisors during which issuance of the permit was discussed, he was represented by counsel, and at that hearing voluntarily withdrew from his application a request to export water to Mexico. The deputy county counsel had stated as his opinion that the proposed limitation on the export of water was valid. Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith.

A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted

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[2]Section 83421 of the county's ordinances authorized the issuance of a conditional use permit if "such uses as deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the comprehensive general plan."

the benefits afforded by the permit. (Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 650; Zweifel Manufacturing Corp. v. City of Peoria (Ill. 1957) 144 N.E.2d 593, 595; Psyhogios v. Village of Skokie (Ill. App. 1972) 280 N.E.2d 552, 556; Skipjack Cove Marina, Inc. v. County Commissioners (Md. 1969) 250 A.2d 260, 265-267; Stevenson v. Palmer (Tenn. 1969) 448 S.W.2d 67, 69; cf. Naper Aero Club v. County of Du Page (Ill. 1964) 197 N.E.2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, and he is bound by the limitation.[3]

We come, then, to the second aspect of the trial court's determination, i.e., that the conditional use permit issued to Simpson did not authorize McDougal to conduct his water sale business as an intensive commercial operation, with numerous trucks entering and leaving the premises night and day. As we have seen, the permit contained no express limitation in this regard. The trial court's determination was based upon its conclusion that the purpose of the restriction against the sale of water for export was to prevent intensive commercial exploitation of the well on Simpson's property in a manner incompatible with the surrounding residential

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[3]In view of this conclusion, we need not decide whether the prohibition against the export of water was valid. (See City of Altus, Oklahoma v. Carr (W.D.Tex. 1966) 255 F.Supp. 828.) Shelley v. Kraemer (1947) 334 U.S. 1, relied upon by McDougal, is inapposite. In that case, it was held that the enforcement by a state court of a racially restrictive covenant in a real estate contract constituted state action, denying the black purchasers equal protection of the laws. *Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate.

area. McDougal claims that the evidence was insufficient to support this determination, and we agree.

The record establishes that in July 1967 two neighbors opposed Simpson's application for a permit before the planning commission on the ground that commercial use of the property would violate their right of quiet enjoyment, and the county's chief planning officer recommended against granting the permit for the same reason. He testified that the commission was concerned both about the export of water and "intensification of usage of the land" in considering Simpson's application, but did not refer to any specific evidence in this regard. The planning commission determined to hold the matter over for a joint meeting with the board of supervisors in order to allow time for the two bodies to formulate a water exportation policy for the county. That hearing was held in September, and members of both bodies expressed concern over the amount of water being exported from the county to Mexico. After Simpson agreed to remove his request to sell water for use in Mexico, the planning commission reconvened and voted to grant the Simpson permit on the condition that water from the well would be sold only for use within the county. No mention was made at the joint meeting of matters relating to the use of Simpson's land, and in the resolution of the planning commission granting the permit reference was made to problems of water export but none to limiting the character of the commercial usage of Simpson's property.[4]

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[4]McDougal asserts that the trial court erred in finding that there was public opposition to the granting of the Simpson permit because the resolution of the planning commission granting the permit states otherwise. The resolution, dated September 11, 1967, refers to the joint meeting between the board of supervisors and the planning commission and states that "there was no opposition present at *this* meeting." (Emphasis supplied.) Obviously, the resolution refers to the September meeting rather than the July hearing before the planning commission alone. It is clear from the testimony there was opposition to the granting of Simpson's permit at the July hearing.

The evidence relied upon by the county is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead, the commission, after extensive discussion of the water exportation problem, issued the permit conditioned only upon a limitation on the export of water, in a resolution which referred only to that issue. Under these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county.

Thus, the trial court's judgment must be affirmed insofar as it prohibits McDougal from violating the restriction against the exportation of water from the county, and reversed to the extent that it determines that McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoins him from operating his business in this manner.

Our decision does not mean, of course, that the county may not employ means to assure that McDougal does not conduct his business by methods which create a nuisance. As we have seen, the second cause of action in the county's complaint alleged a nuisance, but the trial court found it unnecessary to make findings on this issue because it determined that McDougal's conduct violated the zoning ordinance. Upon remand, the trial court may consider appropriate findings on the county's allegations that McDougal's operation of his business constitutes a nuisance.

One final matter should be noted. The county contended at the trial that McDougal was prohibited from selling water from his well by section 83400 of the county's ordinances,

which provides that nonconforming uses of land must be discontinued within one year. The trial court found that "[A]ny nonconforming use right" of McDougal was terminated by this provision. We have concluded that McDougal had a valid conditional use permit for commercial operation of the well, and the operation of his business did not constitute a nonconforming use.

The trial court's judgment is affirmed insofar as it prohibits McDougal from selling water for use outside the county; it is reversed to the extent that it enjoins McDougal from employing large numbers of tank trucks to haul water from his property and determines that such conduct violates the county's 1970 zoning ordinance.

Mosk, J.

We concur:

Tobriner, *Acting C. J.*
Clark, J.
Richardson, J.
*Sullivan, J.
**Devine, J.
**Brown, (Geo. A.), J.

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of Judicial Council.

**Assigned by the Chairman of the Judicial Counsel.

Order Denying Petition for Rehearing.

In the Supreme Court of the State of California.

County of Imperial, Plaintiff and Respondent, v. Donald C. McDougal, Defendant and Appellant. L.A. 30681, (Super.Ct.No. 43353).

[July 7, 1977]

BY THE COURT

On petition for rehearing, McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court. (Employers' L.A. Corp. v. Indus. Acc. Com. (1918) 177 Cal.767, 771; Prince v. Hill (1915) 170 Cal. 192, 195; People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal.App.2d 772, 779; Bradley v. Bradley (1949) 94 Cal.App.2d 310, 312.)

The petition for rehearing is denied.

Opposition

FILED
JUN 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2093
IN THE

Supreme Court of the United States

October Term, 1981

COUNTY OF IMPERIAL,

Petitioner,

vs.

GUILLERMO CALLEROS MUÑOZ,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

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Question Presented.

WAS ERROR COMMITTED BY THE DISTRICT COURT IN FINDING THAT 28 U.S.C. 2283 DOES NOT BAR RESPONDENTS' PROCEEDINGS IN FEDERAL COURT BECAUSE RESPONDENTS ARE "STRANGERS" TO THE STATE COURT PROCEEDINGS?

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No. 81-2093
IN THE

Supreme Court of the United States

October Term, 1981

COUNTY OF IMPERIAL,

Plaintiffs,

vs.

GUILLERMO GALLEGOS MUNOZ,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

Respondents are individuals and respectfully pray that a Writ of Certiorari be denied and that this Court decline to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceedings on February 8, 1982.

Statement of the Case.

The facts involved in these proceedings have been carefully set forth in *County of Imperial v. Munoz*, 449 U.S. 54 (1980);[1] *Munoz v. County of Imperial*, 604 F.2d 1174 (9th Cir. 1979); *Munoz v. County of Imperial*, 667 F.2d

[1]The opinion of the United States Supreme Court in *County of Imperial v. Munoz* is set forth in the Petition for Certiorari as Annex C (C1-10). Citations hereafter will be to Annex C.

811 (9th Cir. 1982)[2] and *County of Imperial v. McDougal*, 19 Cal.3d 505, 564 P.2d 14, 138 Cal.Rptr. 472 (1977)[3]. Respondents do not take violent exception to Petitioner's statement of the case, but one not so minor point should be cleared up with regard to the litigation between the County of Imperial and its Co-Defendant McDougal in the State Courts. Contrary to Petitioner's statement that "the State Court of Appeal affirmed the Superior Court judgment" (p.3, Petition for Certiorari), and as clearly recognized by the Ninth Circuit Court of Appeals, A-2, "the California Court of Appeal held that the condition barring export of water in McDougal's use permit violated the Commerce Clause, and that the use permit that allowed McDougal to remove water was void."

Contrary to the State Court of Appeal the Superior Court had found both the export restriction to be Constitutional and the use permit valid. It is this dilemma, what to do when a use permit was conditioned on a clearly unconstitutional condition (See *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 884 (1946)), which may, in Respondent's view, have led the California Supreme Court to avoid reaching the Federal Constitutional question by relying on long established principles of an independent State ground: The estoppel of McDougal. Annex H-6.

The virtual invitation for the present litigation extended by the California Supreme Court brings us to the present litigation. Respondents herein, knowing that a California Court of Appeal had ruled the County of Imperial's *Home*

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[2]The opinion of the Court of Appeal in *Munoz v. County of Imperial* is set forth in the Petition for Certiorari as Annex A (A1-12). Citations hereafter will be to Annex A.

[3]The opinion of the California Supreme Court is set forth in the Petition for Certiorari as Annex H (H1-9). Citations hereafter will be to Annex H.

Embargo and *Foreign Policy* unconstitutional, and that the California Supreme Court would not decide the issue, sought resolution of a Federal question in a Federal Court.

REASONS FOR DENYING THE WRIT.

I.

HALE V. BIMCO WAS SPECIFICALLY RESTORED TO VITALITY BY THE UNITED STATES CONGRESS AND SHOULD NOT, AT THIS LATE DATE IN THESE PROCEEDINGS, BE OVERRULED.

Petitioners, by way of a second try before this Court, seek a second bite at this Court's holding in *Hale v. Bimco Trading Co., Inc.*, 306 U.S. 375 (1939). There are at least three good reasons why this Court should not, after considering *Hale* once in these proceedings, undertake to rehear it again:

1. First, and Foremost, *Hale* Was One of the Cases Restored as Governing Law by the Congress in Enacting 28 U.S.C. 2283.

The vitality of the concept set forth in *Hale*, that strangers not bound to prior State Court proceedings as though they were parties are not barred from injunctive relief, was recognized by this Court in perhaps its most restrictive interpretation of the predecessor to 28 U.S.C. 2283: *Toucey v. New York*, 314 U.S. 118 (1941). Mr. Justice Frankfurter, the champion of a narrow reading of the so called "Anti-Injunction Statute" and author of the Court's decision in *Hale* itself, was careful to note that even the restrictive holding in *Toucey v. New York, supra*, did not involve the Court's prior opinion in *Hale*. *Toucey*, 314 U.S. 118, 137

Even if we were not to accept the idea that *Hale* was still good law after *Toucey v. New York*, which seems difficult in view of the author's express language in both *Hale* and

Toucey, it must be conceded that it is good law in view of the Congressional intent underlying 28 U.S.C. 2283. As this Court explicitly recognized in *Mitchum v. Foster*, 407 U.S. 225 (1972)[4]:

> "The Congressional response to *Toucey* was the enactment in 1948 of the Anti-Injunction Statute in its present form in 28 U.S.C. 2283, which, as the Revisor's Note makes evident, served not only to overrule the specific holding of *Toucey*, but to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.' " 407 U.S. 225, 236.[5]

Hale was the law prior to *Toucey*, after *Toucey* and, even more clearly, after enactment by Congress of 28 U.S.C. 2283. For this reason alone, a Writ should not be granted to reargue the vitality of *Hale*.

2. No Policy Advanced by Petitioners Supports Reversal of Hale v. Bimco Trading Co., Inc.

The County in its discussion of the policy underlying *Hale v. Bimco Trading Co., Inc., supra*, confuses Res Judicata with 28 U.S.C. 2283. It asserts that the reason behind the rule in *Hale*, was that "if *Bimco* had been barred by the Anti-Injunction Act, no Federal Court (including the Supreme Court) would ever have been able to correct the State Court's Federal Constitutional error." (pp. 10-11, Petition for Certiorari)

That's blatant nonsense. There is absolutely nothing in 28 U.S.C. 2283 which would have prevented third party Bimco from bringing a separate action in Federal Court for declaratory relief. Bimco's right to a declaration that the

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[4]Ironically cited by Petitioners as support for the proposition that *Hale* ought to be overruled. (p. 11, Petition for Certiorari.)

[5]Also, see Revisor's Notes, HR Rep. No. 308, 80th Cong., 1st Sess., A 181-182 (1947).

Florida statute was unconstitutional was not at issue in *Hale*, as suggested by the County. What was at issue was Bimco's right to an injunction. The County has set up a convenient strawman to knock down through the ironic citation of *Mitchum v. Foster*, 407 U.S. 225 (1972), but the fact is that Bimco could have brought its action for relief with, or without, *Mitchum, supra*, for the right to bring an action for declaratory relief alone has long been recognized.

Hale's vitality continues today, for in the instant litigation no previously defined principle of Comity or Federalism is served by prohibiting third party litigants who were not bound by prior State Court litigation from seeking injunctive relief in a separate action. Although the County has invented a new principle which it may remove as support for *Hale*, the more relevant and long recognized principles underlying both *Hale* and 28 U.S.C. 2283 were argued at length in the prior proceedings before this Court (*County of Imperial v. Munoz*, Respondent's Brief, pp. 44-47).

The relevant policy of Federalism which supports 28 U.S.C. 2283 — that litigants pursue to a conclusion their State Court proceedings — is left untouched by the present litigation. The State Court *never* reached the Federal issue, and these Respondents were never party to, or bound as though parties to, any State Court proceedings.

Stated simply, the County's reason for the rule in *Hale* does not exist. The Writ should be denied.

3. Hale Was Considered at Length by This Court in the Prior Proceedings and Should Not Now Be Reargued.

One principle to consider in granting or denying a Petition for Certiorari is efficient Judicial Administration. This Court's decision in *Hale* was the central focus of the decision in *County of Imperial v. Munoz*, 449 U.S. 54 (1980). The

case was remanded to determine whether Respondents were "strangers" within the meaning of *Hale*, not to afford Petitioners another shot at rearguing *Hale*. What is at stake here is whether or not the District Court erred in its findings that Respondents were "strangers" to the prior State proceedings who were not bound thereby, not the underlying vitality of *Hale* itself!

Petitioners call for this Court to overrule *Hale v. Bimco, supra*, in these proceedings should be rebuffed. Although this Court is certainly not precluded from reviewing *Hale*, as a general rule all matters, questions, points or issues adjudicated in a prior appeal are the "Law of the Case" on subsequent appeals, and will not be reconsidered or readjudicated. 58 C.J.S. Section 1821.

The policies upon which the "Law of the Case" rests include the notion that Appellate Courts should not modify their judgment except by rehearing, and that relitigation of previously considered issues would thwart the object of bringing litigation to an end. These dual policies would be impossible to achieve if issues once considered and decided were to be relitigated anew in the same case on each and every subsequent appeal.

So it is in the present litigation, Petitioners wish to take another shot at *Hale v. Bimco Trading Co., Inc.*, in their request for relief from a preliminary injunction. Petitioner as a Government agency, has tremendous "staying power," and by virtue of its economic supremacy over Respondents can relitigate the question of *Hale v. Bimco Trading Company's* vitality ad infinitum without ever having to deal with the Respondent's Constitutional claim. Respondents were required to expend great sums in arguing the vitality of *Hale, supra*, last time around, and have expended even more in complying with this Court's remand to reach the question of their status as "strangers" within the meaning of *Hale*.

If the District Court's findings on Respondents' status as "strangers" is not the sole question presented by this Writ, and if Petitioners are allowed to reargue *County of Imperial v. Munoz*, and the applicability of *Hale v. Bimco* again, then the entire remand to decide Munoz's position as a "stranger" was an idle act.

Not only would granting of a petition to reargue *Hale v. Bimco Trading Co., Inc.*, subvert the policies underlying the notion of "Law of the Case," but it would be extremely unfair to these litigants when the sole issue on remand was their status as "strangers." The Writ should be denied.

II.

THERE IS NO CONFLICT WITH A STATE COURT OF LAST RESORT WITHIN THE MEANING OF RULE 17 OF THE RULES OF THE SUPREME COURT.

As a basis for granting its Writ, the County sets up a "dramatic" conflict between the Federal Court and the California Supreme Court (p. 7, Petition for Certiorari). The fact is that the conflict, if any, is neither dramatic or different than it was in 1980, when this entire matter was remanded to determine Respondents' status as "strangers." Absolutely *nothing* has changed factually since the last time this Court reviewed this case.

The County's self manufactured conflict in the form of stayed contempt proceedings were before this Court in *County of Imperial v. Munoz, supra*, the orders themselves appended to the County's petition for Writ of Certiorari as Exhibit D. The alleged conflict offers nothing new for this Court to reconsider, and should not form the basis for granting Petitioner's Writ.

Respondents would observe that the fact that California Courts have stayed proceedings against McDougal is a rec-

ognition by the State Courts of Federal Jurisdiction over purely Federal questions.

Not only is there no "dramatic" conflict, but there is nothing new presented to this Court by way of Petitioner's Writ. The Writ should therefore be denied.

III.

THE COURT OF APPEALS DID NOT ERR IN FINDING RESPONDENTS TO BE STRANGERS WHO WERE NOT BOUND AS THOUGH PARTIES TO THE PRIOR STATE COURT LITIGATION.

The Court of Appeals and the District Court are being chastised by Petitioner for applying this very Court's definition of "strangers" to the case at hand. It was this Court in *County of Imperial v. Munoz, supra,* that remanded the case to determine whether Respondents were strangers to the State Court proceedings who were not *bound* as though parties to the State Court litigation. In meeting that test, at both the District and Appellate Court levels, the County of Imperial chose to wholly ignore that portion of this Court's remand qualifying the term "strangers" with the phrase "who were not bound as though parties," and argued that a whole new class of litigants, known as "non-strangers," should be created by those lower Courts.

Stranger than Petitioner's new category of litigants was the definition which they gave it. Petitioners proclaim that this Court's decision created a new class of litigants falling within a "small, new category of non strangers (i.e., privies for Section 2283 purposes)." Be not deluded, for Petitioner's definition of what the District Court or Appellate Court was supposed to do with that somewhat nebulous definition has never been explained by Petitioners. In other words, their argument gets no better — unless something new might be forthcoming if the Writ is granted. To borrow from the Court of Appeals, Petitioner's definition of its new

class of litigants is "hopelessly vague." *Munoz v. County of Imperial* (A-8)

Not only is Petitioner's test hopelessly vague, but its class of litigants precluded would hardly be "small." Under traditional notions of Res Judicata and 28 U.S.C. 2283, all parties and their privies would be barred from injunctive relief. Next, according to the County, all persons who wish to purchase water from McDougal would be barred as "non-strangers." Respondents wonder who would be left to litigate? If the County's class includes all persons who wish to purchase water as "non-strangers," then presumably persons who do not wish to purchase water are "strangers" entitled to injunctive relief. Not having an interest in purchasing water such "strangers" would, of course, lack standing. Stripped of its verbiage, the County's test would bar the entire world from injunctive relief because the County and McDougal engaged in a State lawsuit in which the Constitutional question was never decided.

More importantly, the County's arguments overlook the essential element in both *Hale, supra,* and *County of Imperial v. Munoz, supra:* The necessity of *being bound* by the prior State Court proceedings. The County's attempt to apply 28 U.S.C. 2283 to persons who were not *bound* flies squarely in the face of this Court's own words in both *Hale,* and *County of Imperial v. Munoz:*

> "Neither the District Court nor the Court of Appeals addressed the question whether Respondents in this case were 'strangers to the State Court proceeding' *who were not bound 'as though* [*they were parties*] to the litigation in the State Court.' " (Emphasis added) *County of Imperial,* C 5-6

The notion that the term "strangers" and "persons not bound" by a prior judgment, includes the entire world save those who were "parties" or "privies" to the prior litigation

is hardly new or novel. There is no great debate over the meaning of "strangers." Black's Law Dictionary has defined the term for years as:

> ". . . Strangers are all persons in the world, except only parties and privies. In this general legal significance the term is opposed to the word privy." *Black's Law Dictionary, 5th ed.*

That "strangers" equals "persons not privy" to a prior decision, and is the opposite of "parties" and "privies" was clearly understood by this Court in *Hale, supra*. That "strangers" and "persons not privy" are interchangeable words of art is surely evident from reading the decision relied on by the Court in *Hale v. Bimco Trading Co., Inc., supra*. In *Hale*, the Court in reaching its conclusion relied on *Chase National Bank v. Norwalk*, 291 U.S. 431 (1934), where the phrase "stranger" is used interchangeably with "persons not a privy." Id., at 441.

Both the District Court and the Court of Appeals applied this traditional test in finding respondents were "strangers" and therefore entitled to preliminary injunctive relief. Remand to address a clear question as to Respondents being *bound* to State Court proceedings as though they were parties was not an instruction to the lower Courts to invent a whole new category of litigants.

The District Court and the Court of Appeals made the specific finding required of them in the context of the decisions cited by this Court. This petition should not be granted to, in essence, embark upon a search for a whole new judicial concept creating a new class of litigants known as "non-strangers." Such an excursion is well beyond the original remand in *County of Imperial v. Munoz, supra*, and would render the original remand an idle act. In view of what is at stake in this litigation (a four month preliminary

injunction) and the fact that Respondents are clearly "strangers" who *were not bound* within any heretofore espoused definition of the phrase, the Writ should be denied.

IV.

"THE TIME HAS COME," THE WALRUS SAID, "TO TALK OF MANY THINGS: OF SHOES — AND SHIPS — AND SEALING WAX — OF CABBAGES — AND KINGS — AND WHY THE SEA IS BOILING HOT — AND WHETHER PIGS HAVE WINGS."

> Carroll, Lewis, *Alice through the Looking Glass*, Chapt. 4, the Walrus and the Carpenter, Stanza 11.

As it was with the Walrus and the Carpenter, so it is here. It's time to get to the real meat of the matter. Some day, a Federal Court will have to decide whether or not the County of Imperial's Foreign Policy banning the export of water can survive a Constitutional challenge. The sound and fury over the so called "anti-injunction" statute, 28 U.S.C. 2283, has thus far over shadowed this simple point.

What is at stake here is a *preliminary* injunction, originally issued in August, 1977, to prevent the irreparable harm which would flow to Respondents as a result of a lack of water during the hot summer months of 1977. The trial was set for January 10, 1978, a mere four months later, thus assuring Respondents of a temporary water source during the summer season and all parties of a speedy resolution of the Constitutional question.

Five years later we are still arguing over whether a four month *preliminary* injunction should have been granted — nothing more. We do not know if the District Court will find a permanent injunction necessary, or whether it will decide declaratory relief alone is sufficient. Respondents would suggest that a more orderly procedure in this case would be to deny the petition for a Writ of Certiorari and

let the trial Court reach the Constitutional issue. Looked at in its proper context, a decision favorable to Petitioners on the propriety of the preliminary injunction will not dispose of Respondents' Constitutional claim nor will it evict them from a Federal forum. It will simply cut off their water until after trial.

That the application of 28 U.S.C. 2283 will not terminate the litigation is worthy of note, for it is this specific confusion of the principles of Res Judicata and the statute which causes the County of Imperial its analytical difficulties. Throughout its petition the County seeks to reargue *Hale v. Bimco Trading Co., Inc.*, 206 U.S. 375 (1939), and the issues previously heard by this Court in *County of Imperial v. Munoz*, 449 U.S. 54 (1980), because it believes it will result in the termination of this litigation by dismissal of Respondent's Complaint(pp.4, 8, 12 Petition for Certiorari).

Such is not the case. As noted in *Vendo Company v. Lektro Vend Corporation*, 433 U.S. 623, 642 (1977), the action itself may go forward without preliminary injunctive relief. Mr. Justice Blackmun makes the same point in *County of Imperial v. Munoz, supra*. While discussing the ramification of applying 28 U.S.C. 2283, he observes:

> ". . . a holding to that effect would not oust the Federal Court of jurisdiction to order other forms of relief, such as declaratory relief." C-8.

It is equally worthy of note that Respondent's Complaint seeks just such declaratory relief. Surely 28 U.S.C. 2283 is not also known as the "Anti-Declaratory Relief Act."

Stated as succinctly as possible, this case is not worthy of review by this Court. In terms of what is at stake from a practical view point (a four month preliminary injunction), and the extremely narrow issue presented (whether the District Court erred in finding the Respondents to be strangers),

justice will not be served by granting this petition. Justice will be served by a long delayed trial on the merits. The petition for a Writ of Certiorari should be denied.

V.
CONCLUSION.

The Writ of Certiorari prayed for by Petitioners simply should not be granted. The petition, in reality, presents only a single narrow issue: Whether or not Respondents are persons who were not bound by the County's prior litigation as though they were parties. The County has advanced no new legal argument to consider, save its "hopelessly vague" category of what it calls "non-strangers."

In view of the fact that this case was previously heard by this Court, and that a simple four month preliminary injunction is all that is at stake, a Writ should not be granted to redefine *Hale*, 22 U.S.C. 2283, and the precepts of Res Judicata in the context of Petitioner's test of the three N's: New, Novel and Nebulous.

Respondents respectfully pray that this Court deny the Writ of Certiorari and let the judgment and opinion of the Ninth Circuit Court of Appeals stand.

Respectfully submitted,

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